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The *Ruiz v. Estelle* Class Action Suit: A Retrospective Policy Analysis of Efforts to Improve Health Care in Texas Prisons

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The *Ruiz v. Estelle* Class Action Suit: A Retrospective Policy Analysis of Efforts to Improve Health Care in Texas Prisons

by

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Dedication

This dissertation was written in honor of my parents, Tommy and Skinnie Childers. Their greatest gift was to set me on the path towards searching for social justice.

I also dedicate this dissertation to my children, who have assisted me and endured the years of research and writing: Patrick, Justin, Jeremy, and Christiana and the grandchildren, Sam, Breezy, Charlotte, and Lillian.

Finally, this dissertation was written in honor of Judge William Wayne Justice, to celebrate his perseverance and confidence in knowing he was right, and for the inmates of the Texas Department of Criminal Justice.

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The *Ruiz v. Estelle* lawsuit resulted in a federal judge declaring Texas' prison system unconstitutional in terms of its health care and general conditions. The judge mandated various reforms, which met with considerable resistance from the Legislature and prison officials. This study is a retrospective historical analysis to identify and describe the multiple historical factors of the evolution of policy within the Texas prison system. This study aimed to increase the understanding of the particular historical patterns of the prison environment by revealing processes through the lens of retrospective historical analysis. The study is historical in that it describes a particular set of events, and it is retrospective in that an attempt is made to discover

common patterns and give insight for future policy formulation. Certainly, when institutions undergo massive change they may experience massive economic dislocation, large-scale social movements, political conflict, and even revolutions. The behavior of the Texas Department of Criminal Justice confirmed this prediction.

Moreover, health care was selected as the focus because the health of the inmate is a major indicator of successful reintegration back into society. Inmates should not leave the prison system in a worse condition than when they entered. In order to effectively work towards improving oppressive conditions in society, the social work profession must reassert itself back into the criminal justice system by conducting and studying research such as this and by putting pressure on legislative bodies.

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Chapter 1

Statement of the Problem

Introduction

The cornerstone of the American legal system rests on the recognition and acceptance of the Constitution as the supreme law of the land. The paramount duty of the federal judiciary is to uphold that law (*Marburg v. Madison,* 1803*;* U.S. Constitution, Art. VI, 2). Prison reform begins and ends with the Constitution of the United States, the Bill of Rights, and Amendments to the Constitution. However, reform does not happen on its own or in direct response to extant laws. For prisoners, the Constitution was a locked door, and the protections of the Bill of Rights were hidden from sight until the 1960s. Judicial intervention has been, and continues to be, the tool utilized to achieve prison reform. The purpose of prison litigation is to bring the quality of the "totality of conditions" (Martin & Ekland-Olson, 1987, p. 85) in prisons up to constitutional standards. Circuit Judge Tuttle in *Novak v. Beto* wrote,

> Though we may be dealing with some of the most incorrigible members of our society (although not solely), how we treat these particular individuals determines to a large extent, the moral fiber of our society as a whole and if we trespass beyond the bounds of decency, such excesses become an affront to the sensibility of each of us. (Martin & Ekland-Olson, p. 83)

Today over 2.3 million people are incarcerated in the United States, the highest incarceration rate in the world (Bureau of Justice Statistics [BJS], 2004). Additionally, 6 million people are under the supervision of the U.S. criminal justice system. By 2010, the number of American residents in prison or with prison

experience is expected to jump to 7.7 million, or 3.4% of all adults, according to BJS. Coping with the influx of offenders is a major challenge for correctional systems and society. As of January 2005, Texas had 120 state prison facilities housing approximately 160,000 inmates (this figure does not included federal facilities, jail population, or those on the bus on any given day). Close to 95% of prison inmates will eventually leave prison and return to their families in local communities. However, the recidivism rate fluctuates between 60% and 85% in Texas. Additionally, there are many more people involved with the federal prison system, county jails, probation, and parole that are not included in this number. According to the BJS statistics, the national estimates of the total prison population exceeded 2.3 million in 2004. In 1925 there were 91,669 prisoners accounted for in the United States. By 1970 the population was 196,429; by 1980 there were 315, 974; and by 1990 739,980.

The inmate population has increased steadily since, except during the war years. The first prisoner was admitted to the Texas prison in 1849. The *Sourcebook of Criminal Justice Statistics* provides the following information in terms of the rate (per 1000,000 resident population) of sentenced prisoners under jurisdiction of state and federal correctional authorities. In 1980 Texas had 210 prisoners per 100,000 population. By 1990 the figure was 290 prisoners per 100,000. By 2000 the figure had jumped to 762 prisoners per 100,000.

Ethnic population characteristics of the Texas Department of Criminal Justice (TDCJ) inmates as of August 31, 2004, were the following: Black, 38.8%; White,

31.6%; Hispanic, 29.1%; and other, .5% (TDCJ, 2004). (The agency was called Texas Department of Corrections until 1989 when the name was changed to the Texas Department of Criminal Justice.) Women comprised 7.8% of the total TDCJ population. The population characteristics of the state of Texas in 2000, according to the U.S. Census Bureau (2000) statistics, were Black, 11.5%; White, 52%; and Hispanic, 32%. It is important to note that while Blacks in Texas make up 11.5% of the total population, they comprise 38.8% of the TDCJ inmate population. The majority of TDCJ inmates are Black. The average age of a TDCJ inmate is 36. The youngest male inmate is 15. The oldest male is 88. The youngest female inmate is 16 and the oldest is 80. See Table 1 and Figures 1 and 2 for demographic highlights.

Table 1

Demographic Highlights – August 31, 2004, TDCJ on Hand

Ethnicity	TDCJ %	Texas %
Black	38.8	11.5
White	31.6	52.0
Hispanic	29.1	32.0
Other	.05	
TOTAL number (approx.)	160,000	

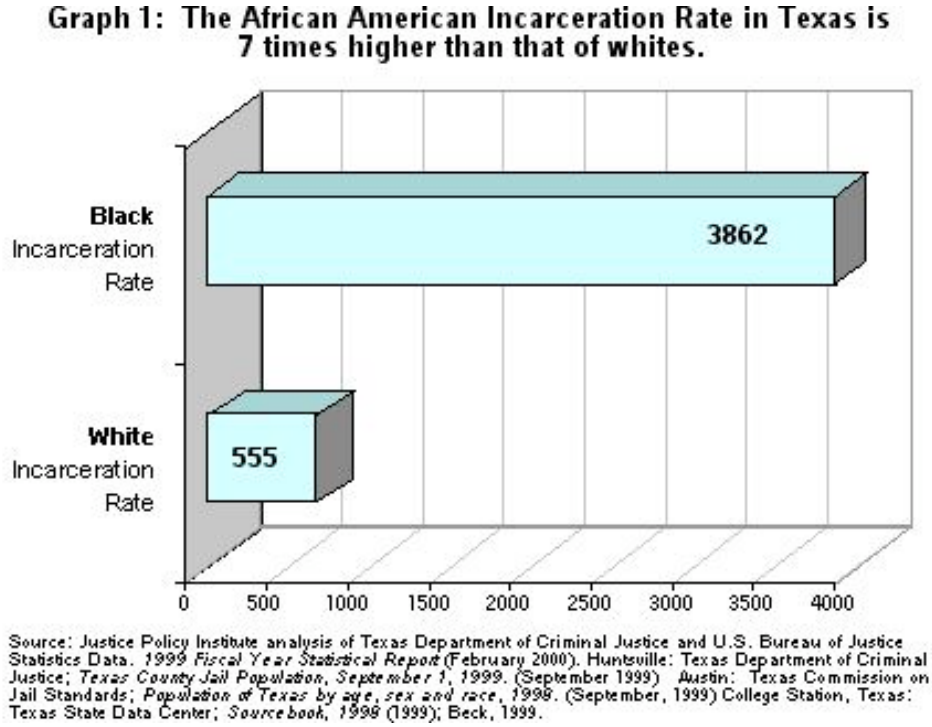
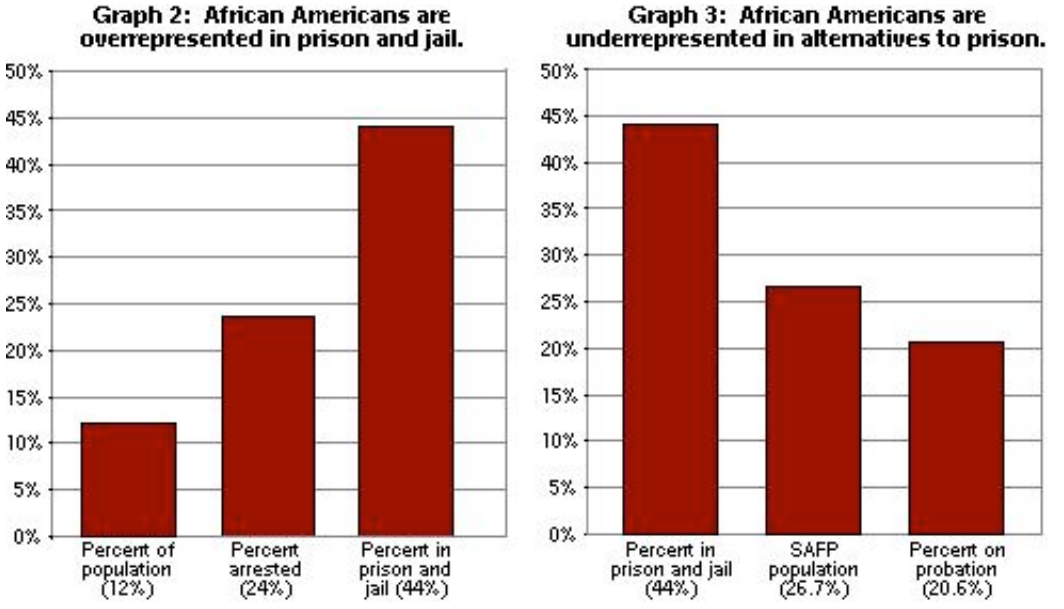


Figure 1. Texas ethnic incarceration rate.



Source: Justice Policy Institute analysis of data from *Crime in Texas, 1999* (Forthcoming). Austin: Texas Department of Public Safety. *1999 Fiscal Year Statistical Report* (February 2000). Huntsville: Texas Department of Criminal Justice; *Texas County Jail Population, September 1, 1999.* (September 1999) Austin: Texas Commission on Jail Standards; *Population of Texas by age, sex and race, 1998.* (September, 1999) College Station, Texas: Texas State Data Center.

Figure 2. Graphs showing African American overrepresentation in prison.

Costs

According to the Criminal Justice Policy Council, spending on corrections in Texas rose from $600 million in 1985 to $2.9 billion in 2002. This affects all other spending by the Legislature. For example, during the 1980s and 1990s, the Justice Policy Institute has shown that Texas increased general fund spending on higher education by 47%, but corrections spending grew by 346%. Put another way, Texas spending on corrections grew at 7 times the rate of spending on higher education during the period. See Figure 3.

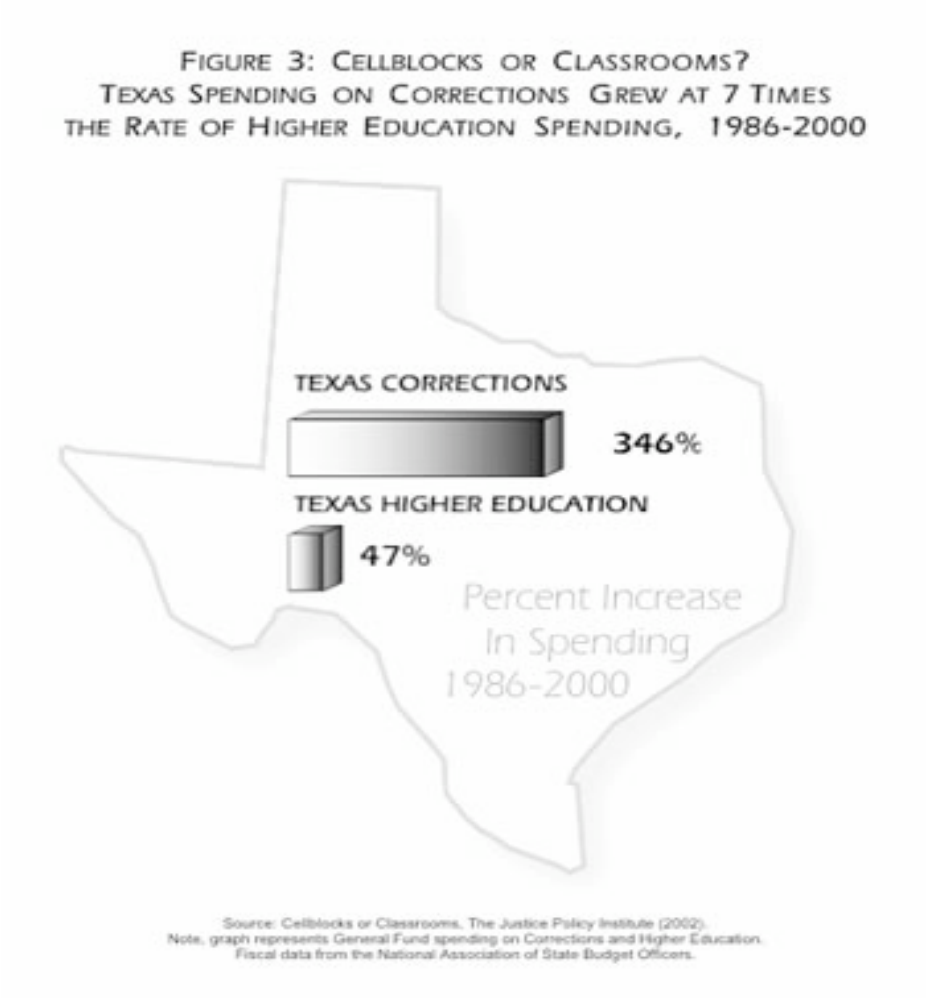


Figure 3. Texas spending on corrections.

This study is a retrospective historical analysis of the evolution of policy within the Texas prison system. This study was designed to identify and describe the multiple historical factors that influenced the policy direction of the Texas prison system. This dissertation seeks to identify, describe and analyze to what extent, if any, judicial intervention—via *Ruiz v. Estelle*—changed the health care system and its policies within the TDCJ (1989). The history of prison health care is fraught with

ethical dilemmas. It is important to deal with the contradictions, paradoxes, conflicting sentiments, economics, and medical necessities of prison inmates now that the courts have affirmed the right of inmates to medical care. It is a complex process to unravel this web of public policies. By using retrospective historical analysis, the following question can be addressed: Has judicial intervention changed prison health care services in the TDCJ for the better, altered correctional practices in a way designed merely to avoid unfavorable rulings, or led to undesirable or simply unanticipated results? Simultaneously, the role of key factors in directing the course of public policy must be articulated, including prison labor (labor exploitation and the neocolonial slave system) and its history amid southern capitalism (the plantation model). The organizational framework demonstrates the vastness of this particular agency.

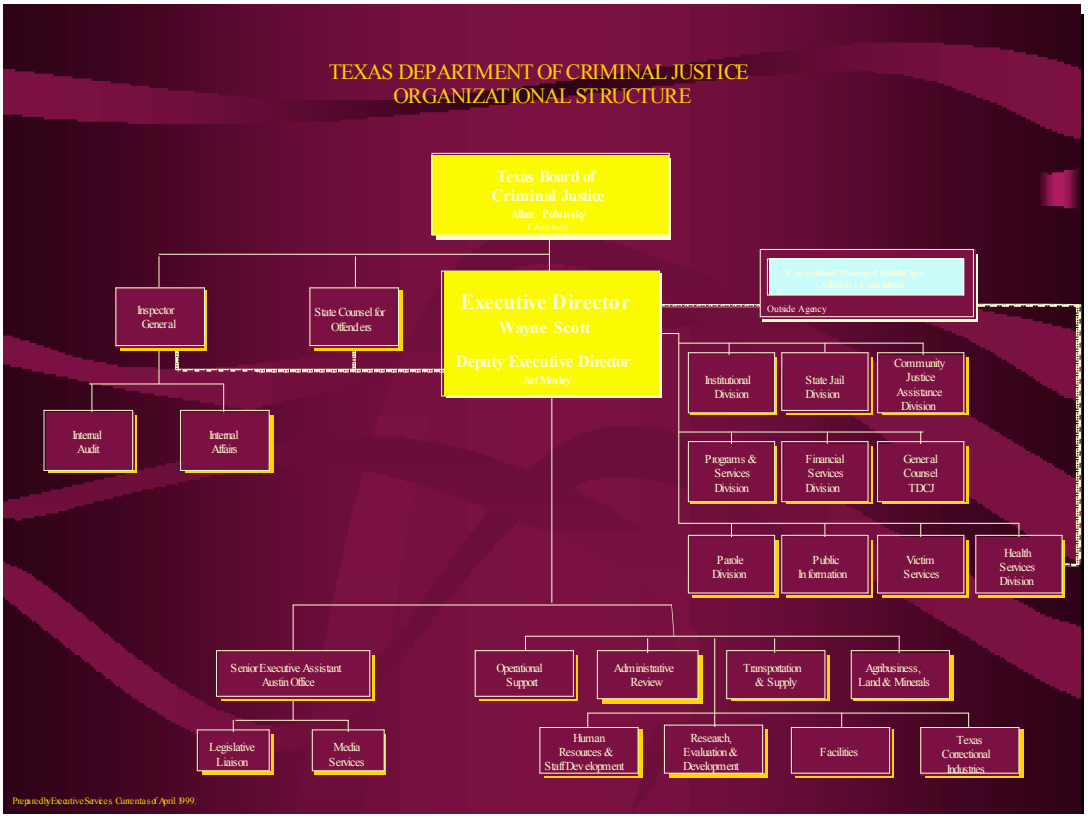


Figure 4. Texas Department of Criminal Justice organizational structure.

The *Ruiz v. Estelle* lawsuit was filed in 1972 in the Eastern Federal District Court of Judge William Wayne Justice. *Ruiz v. Estelle* is the most comprehensive and longest civil action in correctional law history. This analysis of the intervention of Federal Judge William Wayne Justice into the affairs of the TDCJ to remedy unconstitutional violations gives us a rare opportunity to view an important aspect of organizational behavior, how to understand it, and how the policies that govern organizational behavior might change through judicial intervention. The trial, *Ruiz v. Estelle,* began in 1978. Federal oversight of the TDCJ was lifted in June 2002.

However, the U.S. Department of Justice was to continue oversight for 2 years. Prison health care was contracted out with the University of Texas Medical Branch (UTMB) to cut costs. However, costs have not been cut, and some services are lacking.

This study is a retrospective historical analysis (Patton & Sawicki, 1993) of the evolution of policies and the actions of those individuals who were involved and affected by the federally mandated changes within the Texas prison system beginning in 1972. It is a study aimed at increasing the understanding of the particular historical patterns of the prison environment and the interaction between the prison system, TDCJ officials, the Texas Legislature, Texas governors, and the Federal District Court. The intense resistance to the judicial reform mandates cost the state of Texas millions of dollars in legal fees and undermined the TDCJ's credibility with the Legislature. During *Ruiz v. Estelle* questions surrounded this unprecedented resistance and issues of how the battle was to be fought: What were the "rules of the game?" This examination shows a social system as it was and is, with its roots in the past and dynamics in the present. Litigation, as a last resort, has become the potential change agent. The legal system demonstrates the dichotomy between how judicial action and the Legislature and TDCJ officials effect social change.

Until the 1970s, a sentence of imprisonment in Texas not only deprived an individual of liberty, but also put that person's health at risk. The struggle to reform the level of health care services in the traditional prison culture in Texas was illuminated in 1980 when Judge William Wayne Justice declared the entire TDCJ

system unconstitutional in *Ruiz v. Estelle*. Is it possible to conclude that judicial intervention can promote prison reform?

Research Questions

This study was designed to document historically how Texas prison health care developed to the point that it was declared unconstitutional. Additionally, the study sought to identify and describe the multiple historical factors that influenced the policy direction of the Texas prison system. More specifically, this study was guided by the following questions:

1. What factors are involved in the determination of whether the TDCJ met the necessary minimum constitutional standards in prisoner health care, determined by the court, to be a constitutional prison?
2. What does the postlitigation health care system look like in Texas, and is it really different from the prelitigation system? Did this federal court intervention make recognizable changes in the organization, structure, or policies of the health care system in Texas prisons?
3. What were the mandates established by the court to achieve change?
4. What factors act as barriers to the change process? The court assumes that its orders will be followed and thus will result in change within key areas of the health care delivery system and the policies that govern it within the TDCJ. Otherwise, there would be a serious breakdown in the justice

system. The extent to which this assumption is valid was explored in this study via the following subquestions:

(4a) To what extent, if any, does the resistance to change from various parties act as a barrier to the change process?

(4b) To what extent, if any, does the resistance to change originate from historic issues of federalism and states' rights?

(4c) To what extent, if any, does the resistance to change stem from the location of the Texas prison system in a southern state, which was, and is, operated on the plantation model?

(4d) To what extent, if any, is the resistance to change rooted in the history of slavery in this southern state?

5. What factors acted to facilitate the implementation of the mandated changes? This question has four subquestions:

   (5a) Are political factors involved in the success or failure of the court-imposed changes?

   (5b) Are economic factors involved in the court-imposed changes?

   (5c) If prisons are big business, is this a factor in the court-imposed changes?

   (5d) Do prisoners become commodities within the system, and is this a factor in the court-imposed changes?

6. What is the "life expectancy" of changes that ultimately occur after federal oversight ends?

One example related to Research Question 6 that raises questions about the future of the TDCJ is that in February 2005 the Texas prison system reached its operating capacity (again), meaning there are too many inmates as prescribed by the Federal Court's rulings. Tony Fabelo, executive director of the Criminal Justice Policy Council, told a legislative panel that the prison population was expected to expand by about 5% in 2003 and by an even greater rate over the next 2 years (*Dallas Morning News*, 2003). It appears that the problems within the TDCJ have come full circle without real improvement in health care; what has changed when viewed through the lens of the "evolving standards" of society?

An important question in prison reform litigation is whether the process has been in any sense a success in changing the quality of health care. Defining and measuring success in health care reform is difficult. It would be quite complicated to define descriptions such as "humanistic" and "quality." The definition of success will be different for the TDCJ officials (e.g., cost containment) and inmates (better quality of health care). Further, the judge could express a third definition. Therefore, the objective is not to determine that the intervention was a total success or an absolute failure, but rather to evaluate the extent to which changes in key areas of health care policy occurred or did not occur and the nature of those changes.

Analysts have used images of colliding worlds and seismic upheavals to depict the clashes that occurred as a result of the judicial intervention by Judge Justice. In spite of changes occurring in the Texas prison system, TDCJ continues to

be known across the United States as one of the "toughest" prison systems across the states.

Historical Research

The purpose of this retrospective historical research is to create an overview and a foundation upon which to build new knowledge and understanding of the making of social policy. Historical research and analysis are policy oriented; they can raise people's consciousness about particular events. Knowledge without a sense of the past is peculiarly orphaned and rootless. If we do not know where we come from, we cannot know where we are, or where we are going. Historical knowledge, at the very least, can expose fallacies and raise important questions. One cannot begin to understand the current situation in TDCJ and the dynamics of *Ruiz v. Estelle* without learning the history of the prison system as well as the history of the state of Texas, beginning before Texas was a Republic. The attitudes derived from Southern and "Texian" concepts of states' rights, independence, rugged individuality, and true resentment against domination.

Thus it is important to understand how African Americans in the South have endured slavery to Freedman status, sharecroppers to tenant farmers, Black codes and Jim Crow laws, to *Brown* in 1954 and citizen status. Additionally, the significance of the civil rights and individual rights evolution from the Declaration of Independence apply to present-day prison reform, where Blacks are overrepresented in the prison system. This retrospective historical analysis review will tell a story about the world

studied, which involves understandings, images, and interpretations of that world and this particular phenomenon of judicial intervention. The goal is to connect the functioning parts to the whole in seeking explanations and understanding of the institution in efforts to improve the development of social policy.

This review begins to weave together the story of the background and history of facts, happenings, cases, issues, and the stories of some of the actors involved in the ongoing saga that led up to the historic class action suit of *Ruiz v. Estelle* and the findings of the federal judge in 1980 that the entire TDCJ system was "unconstitutional." As the process begins of weaving together this story, I refer to researchers and their knowledge about this type of journey.

Judicial rulings by the federal district courts have become the most successful tool to achieve change in state prison systems (Dilulio, 1990). The power of the federal district courts and their role have evolved since their establishment by the first Constitutional Convention. Knowledge of the evolution of the courts is an important aspect in understanding the dynamics that occurred between the federal district court and the social system that lead to its creation. It was not until the Civil War that a few people—advocates and people from the legal profession—began to recognize and assert that personal rights were guaranteed by federal law and that it might be necessary to use federal law as a model for state actions—the protection of some citizens against those in control of the government. It became clear to many that judicial review was constitutionally mandated. James Madison (1789/1990) had addressed this very point:

> If they [the Bill of Rights amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against any assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

Until 1960 the federal courts generally dealt with both public and private agendas centering on issues of private rights, water rights, railroads, and business disputes. A gradual change began in the 1950s and 1960s, led by the Supreme Court, which began to extend its actions and views on individual civil rights that are protected by the Constitution. Not all federal judges approved of this revolutionary reorientation toward civil rights. Many, especially in the South, continued to oppose the shift well into the 1960s and continue even today to label this "judicial activism." Years of constant pressure from the Supreme Court and the Circuit Courts of Appeals would be needed before such correctives as desegregation became even a *de jure* reality; still more before they became *de facto* (Peltason, 1961).

Brown v. Board of Education (1954) was the most far-reaching impetus to get civil rights legislation started after the Civil War. The Supreme Court ordered that desegregation commence, and it did, albeit very slowly. Initial successes of desegregation made it possible for other civil rights issues and institutional reforms to come to the forefront—to have their "day in court." Public law litigation, federal questions arising from the Constitution, was demanding more of the courts' attention.

Prisoners' rights cases soon reached the district court dockets. Throughout American history, courts have largely ignored legal claims filed by prisoners against

correctional systems and administrators. Inmates were considered legal nonentities, treated as nonpersons, devoid of most constitutional rights and perhaps human rights. The legal status of prisoners was poignantly expressed by the Supreme Court in 1871 as "slaves of the state" in *Ruffin v. Commonwealth* (1871). This ruling made it clear that prisoners, like slaves, had no constitutional rights or legal protections, had no forum for presenting their grievances, and basically could be treated in any manner without further recourse. It is stated in the ruling: The prisoner as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is, for all practical purposes, a slave of the state. Additionally, the passage of the Thirteenth Amendment sanctioned the idea that prisons could be used as a means of social control and labor exploitation. The Amendment states, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

But unlike slaves, prisoners were invisible. From 1871 to well into the 1960s, the federal judiciary adhered to a "hands-off" policy towards prisoners. The judiciary refused to intervene in prisoners' complaints out of their concern for federalism and separation of powers and a fear that judicial review of administrative decisions would undermine prison security and discipline. Prisoners, therefore, were isolated from the rest of society, literally "behind the walls." The possibility of prisoners' forming alliances with groups outside prison was very limited. The precondition for the

emergence of a prisoners' rights movement in the United States was the recognition by the federal courts that prisoners are persons with cognizable constitutional rights.

A few prisoners' rights cases were handled by the courts prior to the 1960s. However, most case filings were ignored. The demise of the "hands-off" doctrine, and the new era of prisoners' rights, began in the 1960s in the wake of the civil rights movement when *Brown v. Board of Education* (1954, 1955) ushered in a new era of civil rights. After *Brown* many disadvantaged individuals and groups were extended the same rights and protections that were supposed to be granted to all citizens. *Brown* led to a "revolution in rights" in institutions such as public schools, mental hospitals, and prisons. The overall legal standing of prisoners and their ability to petition for their rights began to change by the mid-1960s. A number of Supreme Court decisions gave reform lawyers means to demand consideration of prisoners' rights complaints. The 1966 *Miranda v. Arizona* (1966) decision coupled with the 1964 *Escobedo v. Illinois* and *Mapp v. Ohio* (1961) decisions gave reformers their first important wedge. The Court recognized that the normal practices and procedures of police and prosecution might prejudice defendants' chances to a fair trial. From another angle, the Court ruled in *Monroe v. Pape* (1961) that federal courts, under the 1964 Civil Rights Act, were to hear cases in which individuals claimed interference with federally protected rights, even if all state remedies had not been exhausted. Most importantly, the Supreme Court ruled that the Civil Rights Act of 1964 did protect the rights of convicts in state prisons. Finally, with the Civil Rights Act of 1964 the precondition for the emergence of a prisoners' rights movement had been

met: The federal courts had to recognize that prisoners are persons with constitutional rights. Beginning in 1964 with a trickle of cases, 6,240, prisoners' petitions soon ballooned to 16,266 in 1971, an increase of 160% in the 6-year period (Administrative Office of the U.S. Courts, 1964, 1971).

In the new era of prisoners' rights the Black Muslims precipitated the most successful efforts to promote change in public policy that affected prisoners. The Black Muslims filed lawsuits throughout the country in the early 1960s asserting denial of racial and religious equality. In 1964, *Cooper v. Pate* in Illinois marked the beginning of change in prisoners' litigation rights. *Cooper v. Pate* is considered to be the Supreme Court's first prisoners' rights case since before the Civil War. The case was an appeal from a lower court ruling upholding the discretion of prison officials to refuse Muslim prisoners their Korans and all opportunities for worship. The substantive aspects of the *Cooper v. Pate* decision were the Supreme Court's determination that prisoners have constitutional rights; prison officials were not free to do with prisoners as they pleased, and the federal courts were obligated to provide a forum where prisoners could challenge and confront prison officials. Therefore, the Supreme Court held in *Cooper v. Pate* that state inmates could bring suit against prison administrators under Title 42, Section 1983, of the Civil Rights Act of 1871. This ruling, in and of itself, transformed the legal status of prisoners and unbolted the door to allow prisoners' rights litigation.

The success of the Muslims on the constitutional issue of free exercise of religious rights brought the federal courts *into* the prisons. The abdominal conditions

in American prisons *kept* them there. Following the success of this lawsuit, inmates began filing other suits to challenge virtually every aspect of the conditions of prison confinement. By the 1970s, some entire state prison systems (e.g., Arkansas, Alabama, Rhode Island, and Mississippi) were found to be unconstitutional. Interestingly enough, most of these "totality of conditions" lawsuits occurred in Southern states. Many of the prisoner petitions were under the Eighth Amendment, which prohibits "cruel and unusual punishment" for those awaiting trial in jail or convicted of crimes in prison.

Persons incarcerated in state prisons around the nation increasingly attacked the conditions of confinement as unconstitutional. Throughout American history federal judicial intervention has been compelled by the denial of constitutional rights to citizens. Federal judicial authority was longer in coming in institutional reform. Many federal judges have contended that state laws, policies, and procedures that systematically deny the substantial constitutional rights of citizens (minimum constitutional standards) require federal courts to vindicate those rights and to compel obedience to the Constitution. Nevertheless, it should be noted at this point that state officials have often raised the Tenth Amendment's reservation of powers to the states as a defense to the exercise of federal jurisdiction over actions alleging state violations of constitutional rights. This debate is ongoing. Some of the cases that have served as the "building blocks" of the prisoners' rights litigation movement are discussed briefly below. Reform of state prisons achieved the same status of the

school desegregation cases from the 1970s into the 1990s as the main example of judicially managed public law litigation.

Ruiz v. Estelle

One of these related lawsuits was filed in 1972: David Ruiz, an inmate in the Texas prison system, filed a handwritten petition in federal court accusing the TDCJ of violating a number of his civil rights. Ruiz sought declaratory and injunctive relief under Title 42 Section 1983 of the Civil Rights Act of 1871. Ruiz claimed, among other things, that prison staff illegally beat and intimidated inmates and that they did so with the blessing of the Texas prison administration. Ruiz specifically referenced rights protected under the Eighth Amendment, "cruel and unusual punishment" that was transferred to the states via the Fourteenth Amendment. It was Ruiz's contention that conditions (e.g., health care and mental health care) at the Huntsville Unit I East Texas collectively constituted "cruel and unusual punishment."

In 1974, Federal Judge William Wayne Justice combined seven lawsuits filed by other Texas prisoners with the *Ruiz* civil action into one class action suit styled *Ruiz v. Estelle* (1974). Additionally, Judge Justice appointed counsel to represent the indigent plaintiffs. The United States Department of Justice (DOJ) was ordered to appear as *amicus curiae*, represented by counsel for the department's Civil Rights Division (Alpert, Crouch, & Huff, 1984). From spring of 1974 to 1977, parties on both sides engaged in discovery efforts, scrutinizing specifics of the complaint and gathering information for trial. Detailed investigations were conducted of problems

arising from overcrowding, security and supervision of inmates, heath care, mental health care, discipline, access to the courts and other general conditions of confinement. In addition, hearings were held to consider matters such as requests by the named plaintiffs for protection from retaliation by the defendants. An example of the ongoing struggle between the court and the TDCJ, even before the trial began, was the court's decision to issue an order enjoining the TDCJ officials from interfering with plaintiffs' access to counsel. In December 1975, the TDCJ was ordered to stop reading the mail between the plaintiffs and their attorneys. The TDCJ was also prevented from engaging in various forms of harassment, retaliation, and discrimination against inmates participating in the fact-finding process. Some inmates were placed in protective custody to avoid reprisal (Martin & Ekland-Olson, 1987).

The *Ruiz* trial began in 1978. In 1980, following 8 years of delay, 159 days of trial testimony, and 349 witnesses, Judge Justice issued a sweeping opinion against the state of Texas that found the "totality of conditions" in the prison system in violation of the U.S. Constitution in six major areas: (a) overcrowding, (b) security, (c) fire safety, (d) medical care, (e) discipline, and (e) access to the courts. The judge's opinion detailed remedies for each violation. The court assumed that its orders would be followed, which would result in substantive improvements to the health and well-being of inmates. The following is a summary of these ordered remedies:

1. TDCJ must end the practice of putting three inmates in one cell, end the practice of routinely housing two inmates in 45- and 60-square-foot cells, and reduce the overcrowding in dormitories.
2. TDCJ must end guard brutality, increase the number of guards, improve the selection and training procedures for guards, and eliminate the building-tender system.
3. TDCJ must improve its methods of fire safety, water supply, plumbing, wastewater, and solid waste disposal.
4. TDCJ must increase its medical staff, restrict inmates from performing medical and pharmacological functions, improve unit infirmaries, substantially renovate the main prison hospital, establish diagnostic and sick-call procedures that eliminate nonmedical interferences with medical care, improve pharmaceutical operations, update record keeping, and provide better medical treatment to all physically handicapped and mentally retarded inmates.
5. TDCJ must provide all inmates accused of disciplinary infractions with notice of charges and hearings, consider literacy and mental capacity and provide representation for those unable to represent themselves, inform inmates of their right to call witnesses, have sufficient evidence before ordering a "lock-up," improve solitary confinement, and upgrade administrative segregation procedures.
6. TDCJ must desist in blocking prisoners' access to the courts.

7. TDCJ must improve workplace safety and develop an adequate safety inspection program.
8. TDCJ must reduce inmate populations, break units down into smaller organizational entities, and build smaller units near large population centers instead of in inaccessible rural areas.

The order by Judge Justice called for a meeting of attorneys from both sides to work out compromises on some issues and to determine a timetable for change on others**.** In March 1981**,** when this attempt at negotiation failed, Judge Justice ordered the TDCJ to effect the changes ordered and announced that he would appoint a special master to oversee implementation of the decree (Martin & Ekland-Olson, 1987).

Mr. Vincent Nathan was appointed as special master. The role of special master in institutional reform litigation can be complex, however. Judicial alteration of the prevailing policies that governed health care services within the TDCJ rapidly created disagreements, tension, and massive resistance. A review of multiple references detailing years of prison issues indicates the eventual and inevitable citing of unconstitutional violations with the TDCJ. The TDCJ officials believed that as long as the prison units were clean, and the numbers of escapes low, the prisons were operating properly.

Prison Healthcare and Social Work

Families and communities are greatly affected by both the incarceration of family members as well as the inmates' physical and mental condition at the time of discharge. The reason that health care was selected as the focus of this study is that the health of the inmate is a major predictor of successful reintegration back into society. Many inmates enter prison in extremely poor health, due to factors such as poverty, drug abuse, and mental illness. Ruiz's suit proposed that inmates should not leave the prison system in a worse physical or mental condition than when they entered, if the cause of a change in health condition was the inadequacy of the prison health care system. It was on this basis that Ruiz alleged violations of his constitutional rights. The purpose of this retrospective historical analysis was to identify, describe, and analyze to what extent, if any, the health care policies and services in Texas' prisons changed since 1978, the nature of that change, and whether these changes can be attributed to federal judicial decisions by Judge William Wayne Justice.

This study has important implications for social work research and practice. Social workers must know where an organization "has been" in order to work effectively and efficiently within the present and to plan, formulate, and implement effective policies for the future. Social workers in the criminal justice domain have concerns for policy as it affects their role as social workers and the well-being of the inmates. The sheer numbers involved in the criminal justice system in Texas, the number of family members affected, and the effect on local communities dictate an

immediate need for social workers to become knowledgeable about the correctional system.

Social workers need to develop an understanding of the correctional system and how it has evolved. They need an operational understanding of the system. The goal for this study is to contribute to the understanding of the behavior of this organization and to add hands-on functional knowledge. This information will be an addition to the knowledge base of social workers for future reference. This study will help to illustrate the relevance of research and policy formulation in the criminal justice field to social work practice.

Summary

Ruiz v. Estelle (1972) became the instrument utilized to seek systemic organizational change in the quality of health care services received by Texas prisoners. Previously, prisoners' health care was substandard at best. Prisons were left to operate in a self-contained private world largely isolated from the surrounding society. Health care was delivered, if at all, by persons having little or no medical training—even other prisoners, as in Texas—or by small numbers of qualified physicians overwhelmed by huge caseloads. The overarching question of this study is whether the application of the methodology, retrospective historical analysis, helped to understand the question: Has judicial intervention changed prison health care policies and services in the TDCJ, altered correctional practices in a way designed

merely to avoid unfavorable rulings, or led to undesirable or simply unanticipated results?

An explanation of the literature review and historical retrospective analysis methodology of this study is in chapter 2. Chapter 3 presents a review of the literature and litigation to provide a historical overview. Chapter 3 also offers discussion about various issues contributing to the constitutional violations that led to the filing of the *Ruiz v. Estelle* lawsuit. Findings are presented in chapter 4. Chapter 5 is a discussion of the conclusions of the study.

Chapter 2

Methodology

Webster's Encyclopedic Unabridged Dictionary (1996) defined a methodology as "a documented approach for performing activities in a coherent, consistent, accountable, and repeatable manner" (p. 1209). The methodology here is retrospective historical analysis of a social problem that is a part of the general social construction of reality. Heffernan (1992) wrote,

> Our concern is now with the contribution historical sensitivity can make to our understanding of how social problems are defined and how social policies are developed.…The purpose of policy history is to reveal patterns of belief that shape our insight into how policy interventions develop in response to social problems. (p. 129)

Heffernan emphasized that historical sensitivity contributes to the rationality of options under conditions of uncertainty.

The data collection method was the review of the relevant court proceedings/case files of the *Ruiz v. Estelle;* reports and documents of the Texas Legislature that are relevant to the court mandates; Texas libraries and archives, especially The University of Texas Barker History Library; Texas State Comptroller and Texas State Auditor reports; available records of the TDCJ; the U.S. Department of Justice, BJS; federal and state agency reports; legal sources such as Lexix-Nexis; and the U.S. Constitution and its laws. These documents were reviewed for themes, issues, and recurring motifs. The analysis was spread throughout the study, formulating and reformulating as new ideas were introduced or information obtained,

with a focus on common themes and constructs as they appeared. A close reading of the subject matter illuminated the content as a *totality* to develop an understanding of the "rules of the game" of the TDCJ.

Padgett (1998) noted the advantages of conducting a literature review are that the review can shape the study, prevent reinventing the wheel, and promote cumulative advances in knowledge. Strauss and Corbin (1990) noted that concepts from the literature can serve as sources for making comparisons, enhancing nuances in the data that might otherwise be overlooked, and formulating questions for a starting point. Strauss and Corbin also suggested that when a researcher is interested in extending an already existing theory to a different set of conditions, a review of the literature can be helpful. In the case of this dissertation research, it was efficacious to examine certain aspects of the literature.

In what ways do prisons affect people and people affect prisons? What is the quality of life (humanity) inside a prison for all of those involved in this closed community, this microcosm of life? The researcher John Irwin (1996) has noted that prisons today are in turmoil and under immense pressures. Irwin explained that previous research has looked at aspects such as the physical set-up and the rules, the culture that inmates bring with them from the outside such as violence and the crimes committed, and prison gangs. It is Irwin's belief that other dynamics also operate in this picture. John DiIulio (1987), a well-known criminologist, wrote about the prison world:

> The prison is often an extreme example of bureaucracy as managers sometimes try to control people as easily and effectively as they would a manufactured *commodity*. ...The extreme preoccupation of many wardens and staff with rules, power, and coercion is responsible for…poor communication, poor morale… and self-protectiveness on the part of the staff. …Staff is forced to develop their own lifestyle in their own world in order to retain any sort of self-integrity. (p. 236)

There are literally hundreds of ways to define, describe, and discuss policy analysis. Some of these are more helpful and user friendly than others. At this time in history, there is no single or universal definition; a lot depends on the policy problem.

This study is a retrospective historical analysis to identify the multiple historical factors that influenced the policy direction of the Texas prison system. Retrospective policy analysis is a subcategory of descriptive policy analysis, which answers the question, "What happened?" (Patton & Sawicki, 1993). It is a historical description and interpretation of past policies. This is a process of shifting through a body of data and searching for patterns and relationships in order to gain insights about the phenomena of the data described. In essence, this process is based on a survey of available and accessible literature, which then requires a synthesis of the information sources to explain policies. This process is a matter of putting the pieces of the puzzle together. This is an ongoing iterative process in the process of policy development.

This study aimed to increase the understanding of the particular historical patterns of the prison environment by evaluating processes through the lens of retrospective historical analysis. The study is historical in that it describes a particular set of events in an attempt to discover common patterns and give insight for future

policy formulation. Certainly, when institutions undergo massive change they may experience massive economic dislocation, large-scale social movements, political conflict, and even revolutions (riots). The behavior of the TDCJ confirms this prediction.

All history is subject to interpretation, and the history of ideas is particularly controversial. No single interpretation of history commands universal agreement. All institutions have both productive and unproductive opportunities. The instruments of institutional change are both political and economic as they attempt to maximize at the margins (incremental changes) and to appear to offer the most profitable alternatives within the current governmental system.

Current policy issues cannot be fully understood without an appreciation of the historical evolution of both institutions and ideas. Abrams (1972, cited in Rothman & Wheeler, 1981) wrote,

> A humane study that forgets its founders is impoverished, a great critic is subject to correction and supplementation, but is never entirely outmoded; and progress in fact depends on our maintaining the perspectives and the insights of the past as live options, lest we fall into a contemporary narrowness of view, or be doomed to repeat old errors and laboriously rediscover ancient insights. (p. 31)

Earlier writings must be examined in order to incorporate findings and analyses into our current stock of knowledge. Historical research is policy oriented in that it can raise people's consciousness about a particular issue. Knowledge without a sense of the past is peculiarly "orphaned and rootless." If we do not know where we come

from, we cannot know where we are, or where we are going. Historical knowledge, at the very least, can expose fallacies and raise important questions.

New ideas and new programs have the potential to transform public attitudes and social policies. The goal of this dissertation was to inform both history and social policy and identify the major political and economic factors, both external to the TDCJ, and factors of the internal processes of the TDCJ in answering the question of power. Each exerts influence on the other, and an understanding of the relationships may help to explain organizational and policy change.

Multifactored Approach

Theories, theoretical frameworks, and models have been developed over the years in the effort to explain organizational behavior and to understand and evaluate change. These evolutionary theories have proven to be lacking because they are linear, and society does not change in a linear manner. Thus, social change cannot be explained by following a single unique approach.

This research involved many variations and combinations of factors. For this reason, a multifactor approach was adopted for this study. The result was a combination theory of historical social change, a hybrid model to explain the encompassing different phenomena. Therefore, in this research a beginning point is a brief exploration of institutions and organizations and their cultures.

Institutions, Organizations, and Culture

Institutions and organizations function in unique manners and maintain their own cultures. How do these organizations operate? At times it may appear that institutions and organizations do function in their own worlds. This research, through retrospective historical analysis, presents a brief overview of organizations.

Power

The total system of an organization's power system includes the organization and the distribution of available power, politics, influence, and authority. This power is utilized to achieve or maintain a set of goals, attitudes, and values in shaping organizational direction. It includes both the institutionalized and authoritative patterns of decision control as well as the less regular (and even "illegitimate") systematic processes (Zald, 1970, p. 232). A true examination of polities requires observation of the organization's power systems—the enduring social system (formal rules)—the set of agreements (contracts) and understandings that define the limits and goals, the pattern of social organization, both internal and external.

What is meant by the actual power system? What is the source of the power, and/or where does the power emanate from? What governmental body and/or persons can confer the power and also revoke it? When there are references to an absolute amount of power within organizations, the concept of power becomes crucial for analyzing different politics involved (Zald, 1970). The power system is a central factor in shaping an organization's economy. Without an understanding of political

structure and its implicit ethos (underlying spirit), it is extremely difficult to understand the direction of organizational change. Close observation and understanding of the workings of a particular organization may be indispensable (Zald, 1970).

Organizational change normally does not occur because an ivory-towered leader scans the organization and its environment for improving or changing the institution. Indeed, depending upon the amount and distribution of power among members a process occurs in which demands for change develop within the organization or from an outside force reflecting power, opportunity, and/or willingness. For instance, Keynes did not want to revolutionize the entire system (as would Marx), but preferred for the government to acquire more power to control organizations.

Political Linkages

Policies and related aspects of social organization emerge from and in turn shape the organizational environment, such as interrelationships between the external linkages and the particular niche of an organization. Central to this is an understanding that many external forces affect the internal functioning of human service organizations. Each aspect affects the other; nothing is static. Thus, one of the major functions of the organization is monitoring the organizational environment to protect the organization against external forces, or self-protection. Organizations must figure out ways to cope with the impacts of such outside forces on their

organizational activities (Austin, 1988). Types of cooperative external linkages that may support the institution are the forging of alliances (perhaps with the legislature), creation of an "umbrella" organization, and development of other external linkages through organizations or individuals that are in close agreement with the institution. These linkages are political and should be addressed in this framework.

Economy

Analysis of an organization's economy divides neatly into the relations with the economic environment (demands for service, prices of labor and other input factors, and structure of supply) and internal economy (internal division of labor relative to technology, product, and geographic market and rules governing the allocation of resources). An analysis of the economy includes an examination of both (a) the effect of changing supply-and-demand schedules and the distribution and allocation of resources on organizational change and (b) the internal economy's effect on structure as observed in its internal economy and the external economic environment (Zald, 1970).

Two general propositions summarize the relationship of the economy to organizational change. First, factors influencing the economy (such as division of labor, attributes of technology, nature of raw materials, and size) are determinants of structure (such as amount of hierarchy, distribution of power, and conflict potential). Second, as any one component of the internal economy changes, the potential is

created for changing the organization's structure (Zald & Street, 1970). Changes may create a domino effect for other changes and tension.

Control Systems, Conflicts, and Goals

Policy conflicts may be a direct result of goals. A central concern is the manner in which goals are shaped and given direction by prevailing control systems (political and economic factors, the court) and, conversely, the way in which goal changes bring about shifts in internal allocations of prestige and power. Moreover, a major problem with much organization theory is its reductionistic nature (Zald & Street, 1970). Frequently, the internal structure of organizations, or some aspects of structure, is considered without studying the organization qua organization. Many times the internal and external are not viewed as interrelating. Organizations have collective identities and systemic properties; they can and should be considered as whole systems because their components are integrated such as the interaction of values, power goals, control groups with the external supply of money, and other incentives.

As we dig deeper we begin to understand potential conflicts, which inevitably involve organizational legitimation and authority and the roles of the various stakeholder constituencies. Claims of legal rights appeal to the use of reason, and the law furnishes politics with its most important symbols of legitimacy. By appealing to the legal system, claims for social justice have been based on traditional American constitutional values. Further, the individuals that participate in these organizations,

stakeholders, are involved in a continuous political process. In many human service arenas the conflicts that affect the stakeholder constituencies involve traditions and patterns of social change such as are found in roles of human service correctional organizations in this society. Clearly, outcomes of organizational conflicts tend to have broad consequences for the whole society. Austin (1988) corroborated that political and economic processes affect the relationship between the institution and the total society.

Conflicts and tension among the constituencies of the organization, both within the organization and in the outside world, are reflected in conflicting social attitudes and social actions (advocates vs. governmental bodies, Democrats vs. Republicans). At times conflict arises with other constituencies such as the state legislature, which is the funding source and lawmaker for the organization.

To understand why things happen as they do in institutions requires an appreciation of the inextricable linkages between the institution and the economic and political atmosphere, the power of an organization along with the ideological and organizational contexts within which the institution functions. Therefore, a fundamental proposition is the interaction of prisons with the larger ecological scheme: They are involved with social, political, and economic environments.

Continuing measurement plus enforcement can raise the costs of transactions (North, 2002). The most extreme example of transacting costs concerns the relationship between master and slave. There is, in fact, an implicit contract between the two; to get maximum effort from the slave the owner must devote resources to

monitoring the slave's production output and critically apply rewards and punishments based on performance. Although the slave example is extreme, the issue is ubiquitous in hierarchical organizations such as prison systems.

Important Theorists who Set the Stage for Social Change

Max Weber (1904/2001) was one of the first theorists to suggest that social change was influenced by a variety of factors rather than a single one. Weber concluded that technological, economic, political, religious, ideological, demographic, stratification, and other factors are all forces in their own right and are to be considered as a part of the "whole" as well.

Institutions are created by people and also place constraints on them. According to Marx (cited in Etzioni, 1964), constraints or formal rules that become overly persuasive may result in alienation. In the world of Marx (cited in Etzioni, 1964) alienation has a sense of meaningless and powerlessness that people experience when interacting with social institutions they consider oppressive and beyond their control. Prisoners clearly are prone to alienation.

An institution such as the TDJC is an organization to provide for the care and confinement of inmates with its own customs and norms. Goffman (1961) defined *institution*:

> A total institution may be defined as a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life. …The main focus is on the world of the inmate, not the world of

> the staff. A chief concern is to develop a sociological version of the structure of the self…focus: the inmate's situation. (p. 5)

Goffman (1961) labeled prisons "total institutions," symbolized by the barrier to social contact with the outside world. The chief activities of handling human needs by the bureaucratic organization (collectively regimented) are surveillance, demoralization, and humiliation (Goffman, 1961). Institutions are the rules of the game in a society or, more formally, are the constraints that shape human interaction, whether political, social, or economic. However, Goffman noted, "It is widely appreciated that total institutions typically fall considerably short of their official aims" (p. 83). Additionally, TDCJ is **a** *closed institution* as defined by Goffman.

Institutional change shapes the way societies evolve through time and hence becomes a key to understanding historical change. Institutions reduce uncertainty by providing a structure to everyday life and human interaction. Understanding why things happen as they do in institutions requires an appreciation of the inextricable linkages between the institution and the economic and political atmosphere as well as of the ideological and organizational contexts within which the institution functions. Even though institutions have sometimes tried to operate as if they are independent, they are not.

Etzioni (1964) used Talcott Parson's definition of organizations as "social units (or human groupings) deliberately constructed and reconstructed to seek specific goals" (p. 222). Organizations have a unique culture that reflects and supports the organizations' prevailing view of the world. Shared experiences that organizational

members hold in common merge into a whole pattern of beliefs, values, and rituals that become the essence of the organization's culture. Maguire (1997) noted that organizations are greater than the sum of their parts. They expand and contract, rise and fall, and generally take on lives of their own. Organizations are groups of individuals bound by some common purpose to achieve objectives. Organizations are influenced, shaped, and constrained by a complex interaction of political, social, economic, cultural, and institutional forces. Contextualism dictates that all incidents must be viewed in the social, political, and cultural context.

There are multiple definitions of culture. The one used here suggests that culture can be defined as the transmission from one generation to the next, via teaching and imitation, of knowledge, values, and other factors that influence behavior. Culture provides language-based conceptual frameworks for encoding and interpreting the information that the senses are presenting to the brain (Boyd & Richardson, 1985, as cited in Kelly, 2000). Culture defines the way information is processed and utilized, including formal rules (political and judicial rules and contracts), codes of conduct, informal unwritten constraints, and norms of behavior to statue law, common laws, and contracts between individuals.

Institutions are continually evolving (North, 2002). In all societies from the most primitive to the most advanced, people impose constraints upon themselves to give structure to their relations with others, usually in the form of informal constraints or formal rules within their own perceptions. These constraints, and thus institutions, change.

However, informal constraints that are culturally derived will not change immediately in reaction to changes in the formal rules. As a result, the tension between altered formal rules and the persisting informal constraints produces outcomes that have important implications for economies. This organizational behavior is demonstrated within the TDCJ.

The structure of a system and its environment must be distinguished from the process within the system and the interchange between the system and its environment, inputs and outputs. This was utilized in this analysis to evaluate the atmosphere of the TDCJ. The issues are social control, power, resistance to change, and "the rules of the game" between the federal judiciary and the state institution

The goal was to focus on organizations as a whole and at the same time explain their internal structure and processes and address the relations between the organization and its environment; the theory addresses itself to the relations between the organization and its clients (Hasenfeld, 1983). According to Zald (as cited in Hasenfeld), it is "the study of the interplay of power, the goals of the power wielders, and the productive exchange systems" (p. 43). Hasenfeld recommended studying the causes and dynamics of organizational change, especially when old values and institutional patterns are challenged.

Numerous theorists from Jean Jacques Rousseau to John Kenneth Galbraith have engaged in retrospective historical analysis. These analyses have laid a foundation on which future studies can be built. Theorists began by studying Plato's doctrines and his ideal forms of philosophy characterized by his goal of striving

toward the love of the spiritual. Aristotle, a pupil of Plato, emphasized logic, deduction, and investigation as in the Age of Reason, characterized by a critical approach to religious, social, and philosophical matters.

Jean-Jacques Rousseau (1712–1778)

Building on ideas of Plato and Aristotle, French philosopher, author, and social reformer Jean-Jacques Rousseau (1762/1968) in his book, *Discourse on Political Economy and the Social Contract,* wrote,

> I intend to examine whether, in the ordering of society, there can be any reliable and legitimate rule of administration, taking men as they are, and laws as they can be. I shall try, throughout my enquiry, to combine what is allowed by right with what is prescribed by self-interest, in order that justice and utility should not be separated.
>
> People will ask me whether I write on politics because I am a ruler or a legislator. I answer that I am not; and that is the reason why I write on politics. If I were a ruler or legislator, I should not waste my time saying what ought to be done; I should do it, or hold my peace….
>
> I therefore assert that sovereignty, being only the exercise of the general will, can never be transferred, and that the sovereign, which cannot be other than a collective entity, cannot be represented except by itself; power can be delegated, but the will cannot….
>
> The subject is not, therefore, the administration of the social body but its constitution. I make it live, not act. I describe its motive forces and its components and arrange them in their places. I put the machine in a condition to work; others, wiser than I, will regulate its operation. (p. 9)

Emile Durkheim (1918/1968) explored Rousseau's “Social Contract”:

> The science of political economy rests upon a few notions of an apparently simple character. Utility, wealth, value, *commodity,* labour, land, capital, are the elements of the subject ; and whoever has a thorough comprehension of their nature must possess or be soon able to acquire a knowledge of the whole science.
>
> Repeated reflection and inquiry have led me to the somewhat novel opinion that *value depends entirely upon utility.* Prevailing opinions make

> labour rather than utility the origin of value; and there are even those who distinctly assert that labour is the *cause* of value. I show, on the contrary, that we have only to trace out carefully the natural laws….Exchange is so important a process in the maximizing of utility and the saving of labour that some economists have regarded their science as treating of this operation alone. Utility arises from *commodities* being brought in suitable quantities and at the proper times into the possession of persons needing them; and it is by exchange, more than any other means, that this is affected.…But, with these exceptions, I am perfectly willing to agree with the high importance attributed to exchange.…There is no part of the subject of economics which is at once so important and so difficult to comprehend precisely and correctly as that of.…Difficult as it may be to trace the intricacies of the theory of value and avoid confusion of ideas, an even greater intricacy and confusion of ideas besets us here. (p. 69)

Adam Smith (1723–1790)

Adam Smith is often called the founder of modern economics. He was a social philosopher and economist. Among his many publications are *An Inquiry into the Nature and Causes of the Wealth of Nations*, *The Theory of Moral Sentiments*, and the *Wealth of Nations*. The main thesis in the *Wealth of Nations* is that except for limited functions (i.e. defense, justice, public works) there should be limited interference with the economic life of a nation (laissez-faire). Smith did not favorably view the motives of businessmen. Smith wrote, "People of the same trade, seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices" (Smith & Cannan, 1776/1994, p. 4). He saw monopoly, whether private or state imposed, as the "evil" to be combated. Smith's exploration in the relationship between government and business had a profound influence on the development of capitalism. Smith developed the metaphor

of the "invisible hand" to describe the impersonal market forces, which he believed regulated the economy.

Adam Smith questioned how institutions affect the performance of political and economic systems, and vice versa. Among many of Smith's postulates is that the complex exchange of informal and formal constraints makes possible continual incremental changes, which gradually alter the institutional framework. He added that not all human cooperation is socially productive. Smith asserted that there is as much concern with explaining the evolution of institutional frameworks that induce "economic stagnation" and decline as with accounting for the successes. Early theorists assumed that workers disliked the monotony and submissiveness of factory work.

Karl Marx (1845–1867): The Bourgeoisie and the Proletariat

Karl Marx was a German economist, philosopher, and socialist who developed a system of economic and political thought that is as alive today as when he was writing. The doctrine of Karl Marx was that the state throughout history has been a device for the exploitation and alienation of the masses by a dominant class. Further, class has been the main agency of historical change, and the capitalist system, containing from the first the seeds of its own decay, will inevitably be superseded by a socialist order and a classless society.

Marx on capitalism. Marx developed, with Frederick Engels, a theory of historical change called "the materialist conception of history" (Marx & Engels,

1848/1998, p. 234). Marx applied this theory to capitalism. Marx was a prodigious writer and produced a multitude of writings; the most compact presentation of this theory appears to be presented in *Capital*, *Volume 1* (1867/1992).

The great divide between Marx's analysis of capitalism and that of most mainstream economists is substantial. Marx's analysis of capitalism is an intricate theoretical structure, buttressed by a huge compendium of historical description. Marx's method of analysis was very different from that of Adam Smith. In contrast to Smith, Marx sought to understand the forces that cause social change over time.

Marx believed that change resulted from the struggle between opposing, contradictory, or competing forces inherent in all societies. Marx made much of his idea that all economic systems produce hierarchies of social classes, with a top and a bottom, and endless competition and resentment at every level in between. These class struggles emerge in the form of wars and revolutions. The economic organization of human society, or the "modes of production" as Marx called it, was in his mind the most powerful force in determining social structure. Marx came to believe that conflict between the classes was the source of most major changes in human society. He summarized this idea in the following passage from *The Communist Manifesto*:

> The history of all hitherto existing society is the history of class struggles. Freeman and slave, patrician and plebian, lord and serf, guild-master and journeyman, in a word, oppressor and oppressed, stood in constant opposition to one another, carried on an uninterrupted, now hidden, now open fight, a fight that each time ended, either in a revolutionary re-construction of society at-large, or in common ruin of the contending classes. (Marx & Engels, 1848/1998, pp. 34-35)

The extent to which political institutions reflect the needs of the capitalist class can hardly be lost on any person living in the United States today. C. Wright Mills (1962) in his book *The Marxists* agreed with Marx that the mode of production shapes other aspects of society:

> Political, religious, and legal institutions as well as the ideas, the inmates, the ideologies by means of which men understand the world in which they live, their place within in it, and themselves—all these are reflections of the economic basis of society. (p. 82)

Marx described religion as the "opiate of the masses" because he believed that workers in capitalist societies adopted religious beliefs as the only hope in an inexorably grim world. Marx also argued that capitalism would eventually "demean and devalue all that it pulled under its spreading wings" (1846, cited in Sackrey & Schneider, 2002, p. 29). Marx and Engels (1846/1993) noted that money could transform all things, until money itself was all that was important in life:

> Money abases all the gods of mankind and changes them into commodities. Money is the universal and self-sufficient value of all things. It has therefore, deprived the world, both the human world and nature, of their own proper value. Money is the alienated essence of man's work and existence; this essence dominates him and he worships it. (p. 50)

Marx on social justice. Marx and Engels (1848/1998) claimed that the theories of society and human nature inevitably must direct us, as cooperative beings, toward the concept of social justice. Three important concepts in Marxian theory continue to be relevant: alienation, exploitation, and marginalization used by the capitalist society to maintain class inequality. Members of society must sell their labor to survive. Most people work for wages or a salary, which is a one-sided exchange and alienating,

according to Marx. Marx (1867/1992) was convinced that laborers in capitalist societies are simultaneously alienated and exploited by capitalists, through exploitation of the proletariat. Capitalists make a profit, according to Marx, from unpaid labor. The process of extracting unpaid labor from workers begins when workers, who have to sell and must sell that labor to survive in a capitalist system, enter into a contract with the capitalist, who purchases labor as a commodity. The capitalist, not the worker, defines the conditions of labor. This relates to the issue of prison contracts with unpaid labor.

Thorstein Veblen (1857–1929): U.S. Economist and Sociologist

Veblen was a political economist known for his book *The Theory of the Leisure Class* (1899/1994) and many of his theoretical concepts. Veblen's theories of the economy diverge significantly from a mainstream economic analysis and have similarities with those of Marx. Veblen considered the economy dominated by business interests who are prone to cyclical crises, rather than resembling the idealistic competitive world created by Adam Smith.

Veblen ardently observed economies, conflicts, and economic change and was well aware that the modus operandi for mainstream economics was the scientific method, which conflicted with Veblen's social theory. This led him to disagree with economists such as Adam Smith and his "invisible hand" theory. Smith, and his followers, described the social world in the same terms that physical scientists used to describe the physical world. However, Veblen, like Marx, did not think that the social

universe was fixed and immutable. He believed that economic and social change was a permanent feature of the economy, in contrast to Smith. Smith had assumed that the economic world had reached its ideal form in the late 18th century, and thus an analysis of change was deemed irrelevant.

Veblen adopted an evolutionary model to explain the cumulative causation and constant change that he observed. Veblen's method was to study humanity in its process of continuous adaptation to both social and natural environments. Veblen believed that it was crucial to conduct an analysis of economic change from an evolutionary approach to understand the dynamics of any economic system.

Additionally, in Veblen's view, any careful analysis had to unearth the long historical roots of the modern institutions (Lerner, 1976, cited by GAINS, 1998). A common thread runs through economic history, according to Veblen (1899/1994): "Whenever the institution of private property is found, even in slightly developed form, the economic process bears the character of a struggle between men for the possession of goods" (p. 34). In this instance a "struggle" for Veblen referred to the slash-and-burn competition as described by Smith.

As Veblen continued his observations and analyses he began to apply labels, such as entrepreneurs as "undertakers." As time progressed these "undertakers" became "captains of the industry." His taxonomy of the class distinction is similar that of Marx, except with different labels: "warrior," "leisure class," and a "menial productive class." As part of his social theory, Veblen (1899/1994) coined several phrases that continue to be well known today: "conspicuous consumption," "leisure

class," "sabotage," and "captains of industry." These were important theoretical concepts of his system of analysis.

Veblen argued that a fundamental conflict exists between the making of goods/products and the making of money. Veblen (1904/1978) cynically believed that profits are made not by providing an outlet for forces of industrialization and social evolution but by distortion, monetary manipulations, and interference with those who are actually producing goods and services.

Veblen saw that the economy was constantly evolving, and he strove to understand the nature of economic and social change. At the same time, he understood that our anthropological roots influenced our modern economy and believed that the economy could be used to alleviate all the genuine needs of all human beings. Veblen accomplished an extensive analysis of what he thought to be the most important factor for understanding the economy—economic and social change.

John Maynard Keynes (1883–1946)

John Maynard Keynes was an English economist and writer who rocked the world of many economists and probably continues to haunt them. Keynes is included here because he shared two important ways of thinking with political economists, in contrast to the mainstream economists. First, Keynes included human behavior and its dependence on all the senses, unlike mainstream economists who claimed to be making correct scientific judgments of an unchanging system. One of Keynes'

strengths was his willingness to always voice his opinions, even if this offended some mainstream economists. Second, Keynes shared with political economists the conclusion that unregulated capitalism is an "unsustainable system" and that controlling the powerful corporations would require a strong government to oversee the process (cited in Sackrey & Schneider, 2002, p. 103).

No human frailty is more complex than the ability to believe strongly in things that *are clearly not true*. It can be quite costly to trudge forward into the cold and piercing winds of life on the basis of wrong ideas. Keynes attempted to sweep away many of these false ideas, which he called "debris," of earlier thinking. Keynes presented many ideas in his 1936 book, *The General Theory of Employment, Interest, and Money*. A main focus for Keynes was the Great Depression. In spite of the fact that the ravages of the Great Depression and its countless victims were destroying the economy, President Herbert Hoover continued to tell the public, "Prosperity is just around the corner" just prior to the 1929 crash.

While Keynes was a frequent critic of some aspects of mainstream economics, his work was also clearly different from the beliefs of Marx and Veblen. Keynes never gave up the idea that capitalism was the best of all possible modes of production. Thus, Keynes championed government intervention in capitalism because he believed that without it, the system would collapse into chaos.

Keynes sought *reforms* in government policy. Marx called for *revolutionary overthrow* of the capitalist class and the development of a socialist system. Veblen imagined a grand *reconstruction* of capitalism. However, in spite of their differences

these three did agree on two conclusions: (a) Unregulated capitalism is a disaster waiting to happen, and (b) mainstream economists so narrowly defined their discipline that they misunderstood or ignored crucial dimensions of capitalism. Keynes (1955) wrote,

> The paradox finds its explanation, perhaps, in that the master economist must possess a rare combination of gifts. He must be mathematician, historian, statesman, philosopher—in some degree. He must understand symbols and speak in words. He must contemplate the particular in terms of the general, and touch abstract and concrete in the same flight of thought. *He must study the present in the light of the past for the purposes of the future*. No part of man's nature or his intuitions must lie entirely outside his regard. (pp. 140–141)

For Keynes, the entire universe of ideas and knowledge had potential for helping theorists understand the world outside the swirl of prejudices and confusions. Like most mainstream economists, Keynes assumed that good policy based on good analysis would win the day. But Keynes also knew that unregulated capitalism is an unsustainable system that must be overseen by a strong government, which must be more powerful than the most powerful organizations. However, Keynes did not agree with Marx in how the dominating capitalists, and their "executive committee" turn "good analysis" into yet another advantage they have on the playing field.

Keynes (1955) believed that history has an important place in the study of human behavior. Keynes said people "must study the present in the light of the past for the purposes of the future" (p. 140). People's perceptions can change the political and economic framework or leave things at the status quo (such as prisons).

According to Keynes, institutional analysis brings into the theoretical framework formula the importance of the ideas of colonial times. The organizations that arose to take advantage of that era—plantations, merchants, shipping firms, family farms—produced a thriving economy. Whatever the real underlying sources, consequences of institutions are exploited individuals and groups: native peoples, slaves, immigrants, workers, and farmers. The subjective perceptions of the actors (informal constraints) are not just culturally derived but are *continually modified* by experience that is filtered through existing mental constructs (formal rules), which in good time may or may not alter norms and ideologies. Keynes (1955) wrote,

> Inasmuch as the connection between the phenomena of wealth and other aspects of social life, any attempt to separate economic science from social philosophy in general must necessarily end in failure. The phenomena of society, it is said, being the most complicated of all phenomena, and the various general aspects of the subject being scientifically one and inseparable, it is irrational to attempt the economic or industrial analysis of society, apart from its intellectual, moral, and political analysis, past and present. (p. 123)

John Kenneth Galbraith, U.S. Economist Born in Canada in 1908

Galbraith (1958/1998) wrote, "Economics does not usefully exist apart from politics" (p. 93). Galbraith is a long-time critic of mainstream economics and currently a professor at The University of Texas at Austin. He asserted that the essential assumption of earlier economists was that people are "utterly selfish, pleasure-maximizing automatons who respond in predictable ways to all stimuli" (Galbraith, 1996, pp. 284–285). This theoretical creature is called the "economic man" or sometimes the "rational man," and this man is not the kind of human being

the rest of us would ever want to know or be. Therefore, the scientific method of experimentation becomes even more difficult when the subject is human behavior. Therefore, Galbraith (1958/1998) argued, economists are engaging in an exercise in logic based on assumptions that cannot be proven (uncertainty).

Galbraith has said that Keynes, Marx, and Veblen influenced his thinking the most. Like Marx and Veblen, Galbraith has worked outside the confines of mainstream economics. A prominent feature of Galbraith's writing and political activities is that he has argued from the perspective that public policy needs to countervail the immense powers of huge corporations and, more generally, that an unregulated capitalist economy is "chaos-in-the-making" (Galbraith, 1952). Galbraith and other political economists have noted that capitalism is increasingly orchestrated by gigantic firms operating on a global scale. Galbraith's ideas and writings are known and respected worldwide but largely ignored by most of the members of his own profession. Yet political economists, and many others outside the academic world, continue to find much of his work—above all his Theory of Social Balance—relevant and important.

In Galbraith's 1958 book *The Affluent Society*, he argued that the "slavish commitment" of people in capitalist societies to private goods at the expense of public services—such as schools, roads, efficient government, clean air and water, and beautiful cities—could bring these societies to ruin. He called this analysis of private and public spending the "Theory of Social Balance" and stated its essential meaning as follows:

> The family which takes its mauve and cerise, air conditioned, power-steered, and power-braked automobile out for a tour passes through cities that are badly paved, made hideous by litter, blighted buildings, billboards, and posts for wires that should long since have been put underground. They pass on into a countryside that has been rendered largely invisible by commercial art. …They picnic on exquisitely packaged food from a portable icebox by a polluted stream and go to spend the night at a park which is a menace to public health and morals. Just before dozing off on an air mattress, beneath a nylon tent, amid the stench of decaying refuse, they may reflect vaguely on the curious unevenness of their blessings. Is this, indeed, the American genius? (Galbraith, 1958/1998, p. 253)

Social balance is therefore a term that suggests a satisfactory relationship between the supply of privately produced goods and services and those of the state. If a social balance does not exist, then consumer-oriented societies will inevitably produce "private opulence and public squalor. …A politician or public servant who dreams up a new public service is a wastrel. Few public offenses are more reprehensible" (Galbraith, 1958/1998, pp. 260–261).

Therefore, a social imbalance arises from an increase in the production and consumption of private goods that is not matched by an increase in public services required by their use, where "all private wants…are inherently superior to all public desires" (Galbraith, 1958/1998, p. 268). In the introduction of the 1998 edition of *The Affluent Society*, Galbraith wrote,

> On two matters this was right and before its time…One of them is that forty years ago I stressed the compelling difference between public and private living standards. We had expensive radio and television and poor schools, clean houses and filthy streets, weak public services combines with deep concern for what the government spent. Public outlays were a bad and burdensome things; affluent private expenditure was an economically constructive force. …
>
> My case is still strong. The government does spend money readily on weaponry of questionable need and on what has come to be called corporate

> welfare. Otherwise there is still persistent and powerful pressure for restraint on public outlay. In consequence, we are now more than ever affluent in our private consumption; the inadequacy of our schools, libraries, public recreation facilities, health care, even law enforcement, is a matter of daily comment. (p. ix)

In *The Affluent Society* Galbraith (1958/1998) hoped for a better social balance with the coming of the new class of educated people. He believed that the new class would see the problems clearly and fight politically for adequate public services and against the overpowering need of the giant firms. It might be possible to suggest that in the 1960s this new class of people did inaugurate a viable movement toward Galbraith's goals.

About the same time that Galbraith wrote *The Affluent Society*, Michael Harrington wrote *The Other America* (1963). Ideas in the book contributed to President Johnson's proposed War on Poverty. Harrington wrote,

> The real explanation of why the poor are where they are is that they made the mistake of being born to the wrong parents, in the wrong section of the country, in the wrong industry, or in the wrong racial or ethnic group. (p. 21)

This is another way of saying that the society is to blame for poverty, not the poor (environment). A number of political factors sanction the workings of the economy to perpetrate poverty, such as the basic tenet of capitalism—that who gets what is determined by private profit rather than collective need.

What do John K. Galbraith and Thurgood Marshall, U.S. Supreme Court Justice, have in common? They both have maintained that the election of Ronald Reagan in 1980 translated into a push to demonize government and a desire to return to the days before Roosevelt's New Deal social welfare programs of the 1930s. Less

government, the laissez-faire model, continues today, except for expanding the government's roles in national security (still up for debate). Forty years after the publication of *The Affluent Society,* Robert Reich, Secretary of Labor 1992–1996, echoed what Galbraith had to say:

> By some estimates, two thirds of our elementary and secondary schools are in disrepair, and too few of them are providing our children with adequate education. Comfortable movement along public highways and over bridges now requires the most sophisticated of automobile shock absorbers. Public recreation facilities are fast disappearing. More than one in five of the nation's children lives in poverty—lacking adequate housing, clothing, and nutrition. An ever-growing number of and percentage of Americans have no access to heath care. Publicly supported basic research is on the wane. After rising through the 1960s and 1970s, federal investments in education, infrastructure, and research as shares of GDP have continued to fall over the last three administrations. They represented…sixteen percent in 1998, lower than at any time since 1962. (Reich, 1999, p. 89)

The perplexing problem of social balance described here confirms Galbraith's claim, emerging from the work of Karl Marx, that the corporate capitalist class largely molds and directs the actions of the government. The question born in the Reagan election campaign is alive and well today: "Are we better off today then before?" How should capitalist dollars be divided up between the private and public sectors? What are the priorities? How much actual information is available to the public? Is it effective to create and announce a public policy, such as the No Child Left Behind Act of 2001, but fail to fund the program, which gives a false perception to the public? Is it acceptable to dupe the public with policies regarding prisons to maintain the high level of spending to the detriment of the other policies? Or, as

Galbraith would suggest, are we in "a march to the abyss, done in by a love affair with consumer goods?"

Is U.S. capitalism an irrational system? Why has it endured so long? How much do political economic factors contribute to this puzzle? Adam Smith and Marx warned the public about the huge multinational firms' consolidating power. Galbraith and Reich have reconfirmed their beliefs. The result is that, as Marx predicted, for the last century most industries have been dominated and absorbed by a few huge multinational firms and have strengthened their ties to government through donations and lobbyists. Priories are obviously profits and not public services. The rising profits are achieved through monopoly capitalism, which invariably exploits labor in their pursuit of profit.

Howard Zinn

Zinn has invested a great deal of time explaining what true power is. Zinn (1997) has agreed with Max Weber that force is the most direct form of power, and government has a monopoly on that. But in modern times, when social control rests on the consent of the governed, force is kept in abeyance for emergencies. Everyday control is exercised by a set of rules, a fabric of values. Zinn emphasized that force is replaced by *deception* as the chief method for keeping society as it is. This is reminiscent of Veblen's suggestion that the forces of industrialization and social evolution are distorted by distortion, monetary manipulations, and interference with those who are actually producing goods and services.

Retrospective historical analysis uncovers the processes of organizational change. It is a multifactor nonlinear approach to viewing the system's parts of the whole, meaning that the characteristics of complex wholes remain irreducible to the characteristics of individual parts. The persistent challenge is to study social change as indivisible instead of splintering it into millions of Humpty Dumpty's parts, never to be put together again into an integrative, functional whole. Zald (1970) again confirmed this pathway:

> The various parts of any social system are interdependent….The constitution of rights and duties has to be inferred not only from official documents but also from the actions of authoritative bodies….Just as policies and related aspects of social organization emerge from and in turn shape political economy, so also the external linkages and niche of an organization interrelated with its political economy. (p. 13)

Retrospective historical analysis can produce informed decisions regarding the simplicity or complexity of the holistic ontology (nature of existence/reality) of the human system and its subsystems. One of the fundamental propositions about prisons is that they are participants of the larger social, political, and economic environments and therefore may be plugged into this open-ended analysis. This approach postulates that economic and political forces, structures, pressures, and constraints (a) are among the most significant motivators of change and (b) are the key factors shaping directions of change.

Consider Rothman and Wheeler's (1981) comments about the system in *Social History and Social Policy*:

> Scholarship—and this includes historical scholarship—is valuable when it shows us social systems as they are and were, rigorously, with all their

> shadings and depths, their roots in the past and their dynamics in the present. When we beam the searchlight of scholarship on criminal justice, what do we see? It is worse than decentralized; it is not much a system as an exploded system; little bits and pieces lie around in every state, city, town, and police station. It has been that way for generations. Coherence cannot be imposed on such a system. There are too many people with a finger in the pot. Legislators grind out rules, police and detectives find and arrest criminals, prosecutors prosecute them, and defense attorneys defend them, judges, juries, probation officers, prison officials, parole boards, and others all have parts to play, not to mention the defendants and their families-and the victims and theirs. Everybody has his own viewpoint and interests. Everybody can veto everyone else. The police can make nonsense of the work of the judges; the judges can throw a monkey wrench into the work of the police. Probation officers and prison guards can destroy the plans of the legislature. The jury can make a mockery of rules. Any root-and-branch reform has to take all these roles and processes into account. The people who scream for harsher sentences forget the system is like a leaky hose: If you turn pressure up at one end, more water may or may not run out at the other. Historically, a system has developed which is extraordinarily gangly and loose-jointed. This kind of system is not easy to change from above-or below. (p. 233)

Anticipated Change

A main purpose of retrospective historical analysis is to analyze organizational change, having as a goal to set the stage for change. This is also a story about values of an organization. Prisons are, after all, human service organizations mandated by a state legislature. While inmates are incarcerated, the prison system has constitutional responsibilities for the care of those individuals. Human service organizations therefore should involve value judgments that have moral consequences, not just for the inmates, but also for other involved individuals, families, and communities. The effects of such services ought to be judged expediently in *human value* terms, not just in *functional* or *profitability* terms. Goals,

values, and traditional operating modes must be sharply questioned in the journey towards an understanding of a prison system.

This approach examines the past interplay of political processes and structures with economic processes and structures, interactions between economic forces and political forces, that is, sources of power. Additionally, this process encourages dialogue about environment, power, internal power structures, political linkages, economy, control systems, conflicts, and goals.

In this study the environment is the major source of expectations about behavior and performance of an organization (Etzioni, 1964). Just as environmental and technical conditions shape the internal structure of an institution, custodial institutions depend on the external political process for their legitimacy, their formal authority, and their funds. Of primary importance is the relationship between the external organizational environment and the institution. Political institutions communicate their expectations for public agencies through (a) formal actions, such as legislative enactments or a chief executive's appointment, and (b) informal acts, such as budget allocations. Environmental and technical conditions shape the internal structure of an institution. Because of the costs (all costs, not just financial) of designing and implementing new routines, old routines, once established, are highly resistant to change and tend to be stretched to cover novel situations for which they may ill suited (Etzioni, 1964). Any change that threatens to disrupt the well-defined informal structures of custodial institutions very likely will encounter great resistance.

A specific case in point is the behavior of the TDCJ in the transformation in living conditions in the TDCJ as mandated by the federal judge and the TDCJ's extreme resistance to all changes. What are other possible explanations for the extreme resistance to implementation of the court's mandates on the part of TDCJ, the different state legislators, governors, and prison officials? The organizational behavior must be scrutinized to arrive at an understanding of what took place in the interactions between the organization and the outside force of the federal judiciary. Litigation, as a last resort, became the change agent for this organization.

Prisons Are Political

The degree of politicization in a dispute depends on two components in a case: (a) the status differential between the litigants and (b) the nature of the dispute. In cases where there is a large difference in power between the parties, the dispute is likely to contain a high degree of politicization, particularly if the case involves an issue that directly relates to the political system (Carp & Rowland, 1983). In state prison litigation, there is a tremendous status differential between state prisoners and the defendants of such litigation, prison wardens and state public officials. In addition, state prison litigation involves fundamental political issues, such as separation of powers, checks and balances, and federalism.

Eventually, punitive attitudes and tough-on-crime policies formed the platform of many political candidates. Lyons and Scheingold (2000) wrote, "The underlying thesis is that crime control is politically constituted: policy choices are

driven by, and responsive to, prevailing values and interests rather than criminological knowledge" (p. 103). They added, "Winning and holding public office, not crime control, are driving the policymaking process" (p. 116).

> It seems much closer to the mark to think of punitive policies as starting at the top, so to speak, and being driven by the electoral needs of political leaders—rather than by either the crime rate or by public clamor. …Instead, the politics of crime and punishment emerge out of complex and reciprocal interactions mediated by a variety of values and institutions—most prominently via the media. (Lyons & Scheingold, p. 118)

The political-industrial complex is real and not a fictional product of cynical theorists. Schlosser (1998) defined the prison-industrial complex:

> The prison-industrial complex is a set of bureaucratic, political, and economic interests that encourage spending on imprisonment, regardless of the actual need. It is a confluence of special interests composed of politicians who have used the fear of crime to gain votes; aided impoverished rural areas where prisons have become a cornerstone of economic development; private companies that regard the roughly $35 billion spent each year on corrections not as a burden on American taxpayers but as a lucrative market; and government officials whose fiefdoms have expanded along with the inmate populations. (p. 124)

False concern about the crime wave has become a symbolic vehicle to channel activities about social order by the dismantling of racial and gender hierarchies (Beckett, 1977), economic restructuring (Currie, 1998), and large-scale immigration (Tyler, Boeckman, Smith, & Huo, 1997). From this perspective the mobilization of laws and resources for imprisonment is political opportunism and serves economic interests rather than rational public policy.

Research

Historically, the administration in Texas prisons has made little use of research information. If research had been put into practice years ago, some of the violations might not have not occurred and Texas taxpayers could have been spared the tremendous expense. Research has shown that punishment alone does not work, thereby questioning the value of the unprecedented growth in the prison population (Sabol & Lynch, 1997, as cited in Lurigio & Swartz, 2000). Tonry (1995) wrote, "The clear weight of the evidence in every Western country indicates that tough penalties have little effect on crime rates" (cited in Lyons & Scheingold, 2000, p. 108). In fact, extended periods of incarceration have been shown to actually cause more harm than benefit. Currie (1998) argued, "The more or less indiscriminate incarceration of more and more offenders will be subject to the law of diminishing marginal utility, which at some point increasing incarceration will do more harm than good" (cited in Lyons & Scheingold, p. 110). Lyons and Scheingold stated, "Punitive policies are destructive in a number of ways….They have exacerbated racial cleavage and, in effect, are shattering communities in order to save them" (p. 104).

> We argue that regardless of whether or not punishment "works"—itself a contested proposition—it diverts attention, energy, and resources from strategic responses that recognize and respond to the complexity of the crime problem as it is revealed by social inquiry in general and criminological knowledge in particular. (Lyons & Scheingold, p. 104)

Clearly, politics drives correctional policy. Politicians have convinced the public that more imprisonment reduces the crime rate, although this is not based on current research. Rothman (1971) stated,

> Prisons do not diminish the crime rate: they can be extended, multiplied, or transformed; the quantity of crime and criminals remains stable or, worse, increases….Detention causes recidivism; those leaving prison have more chance of going back to it; convicts are, in a very high proportion, former inmates. (p. 226)

The only consistent measure that researchers currently rely on to judge whether imprisonment actually "works" is the rate of recidivism. The recidivism rate obviously has major policy and programmatic ramifications for state correctional departments (Wilson & Anderson, 1997). However, this research information is unacknowledged by prison officials or politicians.

For the future, as prisons try to maintain current policies and procedures, theorists know that the success of correctional policies lies in research on what works and why, for whom, and when. The greatest challenge may be politics as the driving force behind the development and implementation of correctional policies. Lyons and Scheingold (2000) summed up the issue:

> We argue…for an approach to crime control that strikes a better balance between punishment and prevention on one hand and that deals with causes as well as symptoms on the other hand. Movement in that direction will be possible only if we understand why punishment has tended to crowd out alternative responses to crime. (p. 105)

There must be an informed decision-making process to achieve a balance between the punitive approach to crime control and successful correctional policies. These questions can be answered through research. The research currently shows no clear relationship between the rise in incarceration rates and crime as a political issue. Rather, it is clear that a tough-on-crime stance for politicians is politically expedient.

A review of several studies indicated that the mentally ill are perhaps the least understood and researched subgroup in the prison system (Halleck, 1986, as cited in Marquart & Brewer, 2000; James et al., 1980, as cited by Lurigio & Swartz, 2000; McCarthy & Zald, 1977; Steadman, Monahan, & Hartstone, 1982, as cited in Steadman & Cocozza, 1993). Further, although these studies stated that mental illness is an issue in prisons, they shed little light on the questions of diagnosis, functional disability, duration and course of individual illnesses, or even the current prevalence of mental disorders in prisons. Steadman and Cocozza reported a lack of clear criteria and definitions; multiple variations in the way prisoners are classified, diagnosed, and tested; and differences in informal designations of offenders as mentally ill. Daniel et al. (1998) studied 100 female prisoners in Missouri using interviews and the Diagnostic Interview Schedule (DIS) to generate a diagnosis. They found higher rates of psychiatric diagnoses than what has been found in the general population. However, they did not address whether or not appropriate assessment instruments were used. Steadman and Veysey (1997, cited in Veysey, 1998) found in their survey of jails and prisons that prisons are "ill equipped" to treat the mentally ill. Understaffed and underfunded in general (Godwin, 2000), correctional mental health treatment programs reach only a small proportion of the seriously disturbed prisoners.

Moreover, research studies have shown empirically that mentally ill offenders who do receive treatment for their mental illness are less likely to recidivate than those who received no treatment. Maden (1996) found in his research that if not properly treated, mentally ill offenders are more likely to recidivate and recycle

through the system than other types of offenders. Likewise, Wettstein (1998) concluded that the lack of treatment for the mentally ill results in a higher recidivism rate. Kupers' (1999) research showed that the recidivism rate for mentally ill offenders is higher than that of the general population, and the sentences served are longer.

In summary, researchers agree that there has been insufficient research on what works and what does not work concerning incarceration, treatments and rehabilitation, and especially its effects on families and the lives of the prisoners upon release. Tonry and Petersilia (1999) wrote,

> The discussion of research on collateral effects of imprisonment suggests that policy makers have been flying blind, making decisions costing billions of dollars and affecting millions of lives without adequate knowledge of the nature and costs of unintended side effects. (p. 7)

Cost Effectiveness and Benefit–Cost Analysis

In the previous section, the applicability of research in prison issues is clear. Research should be a routine component in the decision-making process about issues of cost effectiveness and benefit–cost analysis. Until recently, research on such issues was rarely considered. After years of prison litigation, it is evident that a major impact of federal court intervention into the management of state prisons has been to dramatically increase state budgets. Yet little research has addressed the costs and benefits of various issues within the prison system. Cohen (2000) pointed out, "Despite their widespread use, cost-effectiveness and benefit–cost analyses have not

been staples of the criminal justice policy analyst's tool kit" (p. 263). Once a federal judge hands down his opinion, the prison and state officials do not have a clear idea about cost. Nor do they have alternatives to choose the most cost-effective method for a particular system. Many times, in the end, the state pays much more than anticipated. In the state of Texas, for example, the prisoner-leasing program ended following a huge public outcry against abuses in the program. The state assumed that if the private contractors could make money, then so could the state. The state quickly learned, however, that this was not the case. There was no research in cost-effectiveness and benefit-cost analysis in 1913, and today there is little, if any, evaluation made in these areas. Recent efforts by Dr. Tony Fabelo and his agency, Criminal Justice Policy Council, to make independent analyses were scrapped when in 2003 Texas Governor Rick Perry eliminated the agency with his one-line veto ability.

Cost-effectiveness and benefit–cost analyses include fixed costs versus incremental costs, direct and indirect costs, and tangible and intangible costs. Actual costs must be the basis for accurate decision making. Research is needed to fully inform policymakers and the general public. Cost-effectiveness and benefit–cost analyses should be routine in the analysis of prison policies and in the formulation of new policies. It could have saved the state of Texas a great deal of money and still could.

Chapter 3

Historical and Political Overview

Introduction

The purpose of this overview is to create a foundation upon which to build new knowledge and understanding of the making of social policy. This study sought to determine and to describe the multiple historical factors that have influenced the policy direction of the Texas prison system. This review weaves together the story of the background and history of the historic class action suit of *Ruiz v. Estelle* and the findings of the federal judge in 1980 that the entire TDCJ system was "unconstitutional."

The BJS (2004) reported that the United States has the highest incarceration rate in the world, reaching 2.3 million in March 2004. The number of people in, passing through, and directly affected by prisons and the criminal justice system together make up the most noteworthy feature of American criminal justice policy. When a total is calculated for numbers of inmates, institutional employees, members of immediate families of victims and prisoners, and residents of communities in which correctional institutions are important employers, it is likely that tens of millions of Americans are each year affected by prisons. The state of Texas, with approximately 160,000 inmates (BJS, 2004), is the largest prison system in the United States. At least 1.6 million children in the United States have an incarcerated parent. The budget for the TDCJ for 2004 was $2.2 billion.

Prison system surveys date back to the late 18th century. The research, however, has been mostly descriptive. A majority of the studies surveyed the physical concerns of the buildings, daily schedules, or violence rates. Abundant surveys of prison populations over the last 75 years have described their characteristics (Guze, 1976; Novick, Penna, & Schwartz, 1977; both as cited by GAINS, 1998). Studies have examined prison records and categories such as "direct challenges to authority," meaning "striking an officer," "threatening an officer," or "refusing to obey an order" (Flanagan, Marquart, & Adams, 1998, p. 76). Another study by David Cooke (1992) examined prison records, especially the categories of the number of assaults, hunger strikes, and "smash-ups." Generally, researchers agree that prisons have multiple problems (Kupers, 1999). There is consensus among researchers that prisons lack services in diagnosis and treatment in the physical and mental health programs (Blumenthal, 1994; Halleck, 1986, as cited in Marquart & Brewer, 2000; Teplin, 1984, 1986; Torrey, 1997). Studies that seek to ascertain the *quality of care* provided to prisoners and *humanitarian issues* were not found.

A prison can be seen as a unique form of society, with its own distinctive set of social and cultural arrangements that include a dominant social structure; a special set of goals, norms, and values; and a serviceable economy. The state prison is embedded within a political, economic, and bureaucratic system that includes the rest of the state government, from the courts, legislature, and elected representatives to related departments such as mental health and regulatory agencies dealing with finance, personnel, or public works. Additionally, there are important constraints on

decision-making at the institutional level such as departmental goals and policy, correctional standards and case law, plant design, budgets, institutional roles, and institutional "climate/culture." Finally, a prison may be operating under a court order that greatly restricts what management can do, or may be willing to do, as in the TDCJ. Change of any kind within the TDCJ always has been slow and painful for all involved. Lives of both guards and inmates have been lost. There is an undeniable social character and culture associated with any prison that is hard to define, and even more difficult to control, yet it affects what can be done within the institution. Organizations do not like change. Years ago Mary Parker Follett (1923) wrote about organizational change as if she had spent a great deal of time behind "The Walls" at Huntsville:

> Some people will continue to seek enjoyment of exercising power over others, even if it is an ineffective way of running organizations….For many reasons the change has been slow and halting. Organizational inertia is enormous; change is painful. (as quoted in Graham, 1995, p. 295)

Power of Federal Courts

A review of the literature illuminates the ongoing struggle regarding the realm of judicial control, review, and power and creates a foundation of knowledge on which to build. This section shows the path of the development of the judicial branch within the federal government establishing its power over states' rights and the development of civil rights, including prisoners' rights. The treatment of African Americans, and courts' responses, will be used as a lens for examining continuity and

change in the area of civil and individual rights. Questions continue to surround the legitimacy of federal judges' right to judicial review—"interfering"—in what many consider the realm of "states' rights."

Civil Rights refers to the positive acts governments take to protect individuals against arbitrary or discriminatory treatment by governments or individuals based on categories such as race, sex, national origin, age, or sexual orientation. Even today some U.S. citizens have yet to experience full equality and the full enjoyment of civil rights that many Americans take for granted. This section documents the evolution and development of judicial review and of the progress of individual/civil rights, from the Declaration of Independence (1776) to the present day of prison reform.

Creation of Federal Judicial Review

The U.S. ratified the Articles of Confederation in 1777. This document was known as a "league of friendship" that was opposed to any type of national authority. Therefore, since the states only knew state sovereignty, the government could not govern effectively because of a general lack of power to compel states to honor national obligations. However, lessons were learned from the Articles of Confederation. The Articles of Confederation served as a transition between the Revolutionary War and the implementation of the current U.S. Constitution. During this transition, delegates to the Constitutional Convention of 1787 disagreed on the role of the courts.

Federalists favored a strong national government. Anti-Federalists, who favored strong state governments, argued that a strong central government would render the states powerless and that the Supreme Court would overwhelm the states by invalidating state laws. James Madison (generally known as the Father of the Constitution), writing in *Federalist No. 51* (1788/1990) argued that the proposed federal government's separation of powers would prohibit any one branch from either dominating the national government or violating the rights of citizens. Madison suggested that the proposed Constitution boiled down to one simple question: "Whether or not the Union shall or shall not be continued." The Anti-Federalists were concerned about the absence of a Bill of Rights in the proposed Constitution, which had been promised. The Federalists and Anti-Federalists finally agreed to a compromise, the Judiciary Act of 1789.

The Judiciary Act of 1789 was an instrument of reconciliation. It established the basic three-tiered structure of the federal court system. The Act created two levels of federal trial courts, each with limited jurisdiction and subject to various local and regional controls. The third tier of the federal judicial system was the Supreme Court of the United States. Of particular significance was Section 34, which ruled,

> The laws of the several States, except where the Constitution, treaties or statues of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States. (Judiciary Act of 1789, 1 U.S. Statues at Large, p.73)

The result was a decentralized federal judicial system whose foundation was "lodged…squarely in the states." Yet, during this time the legitimacy of federal

judges' authority was also firmly established, as manifested in the Constitution of the United States. Congress had enhanced the right of litigants to remove certain kinds of cases from state to federal court. The Judiciary Act of 1789 had limited removals, but the Habeas Corpus Act of 1863 afforded some protection by removal of suits to federal court (later affecting prison litigation).

Article III of the U.S. Constitution addresses the power of the court by establishing a Supreme Court and designating its jurisdiction. Article III, Section 1, of the U.S. Constitution of 1787 declares, "The judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." In addition, the Constitution grants the judges of these courts life tenure "during good behavior" and requires that their compensation "shall not be diminished during their continuance in office." This provision was adopted to ensure that the legislature did not attempt to punish the members of the Supreme Court or any other Judges for unpopular decisions (usually political issues).

Article VI of the U.S. Constitution addresses the supremacy of the national government, commonly referred to as the "Supremacy Clause:"

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Under the Supremacy Clause, everyone must follow federal law in the face of conflicting state law. "A state statute is void to the extent that it actually conflicts with a valid federal statute," and a conflict will be found either where compliance

with both federal and state law is impossible or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (*Edgar v. Mite Corp*., 1982). Similarly, the federal government has held that "otherwise valid state laws or court orders cannot stand in the way of a federal court's remedial scheme if the action is essential to enforce the scheme" (*Stone v. City and County of San Francisco*, 1992).

By 1789 Congress submitted a Bill of Rights for ratification. The Bill of Rights includes numerous specific protections of personal rights, especially safeguards for those accused of crimes. The Tenth Amendment of the Bill of Rights addresses the powers retained by the states and the people: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It became clear that this statement, along with Articles III and VI of the Constitution, might cause a lot of controversy. However, they do underscore the notion that the national government always was to be supreme in situations of conflict between state and national law. In spite of this explicit language, the meaning of the Supremacy Clause (Article VI) has been subject to continuous judicial interpretation and reinterpretation over the years. The Court began to assert the power of *judicial review,* which allows the judiciary to review acts of the other branches of government and the states. Judicial review is the power of a court to review a law or an official act of a government or agent for constitutionality or for the violation of basic principles of justice.

Federalists and the Anti-Federalists reached a general consensus that public law would embrace areas in which the "state has a direct interest." Private law would encompass "disputes in which the interests of individuals, rather than the state, are involved" (Freyer, 1979, p. xv). As courts of general jurisdiction, the federal courts were, and continue, to hear issues involving both public and private law. As courts of public law, they implement federal laws and regulations, define public rights and duties, and balance the needs of the nation with the rights of individuals (rather broad expectations). As courts of private law, they resolve such "mundane, though socially important, questions as debtor-creditor relations, accidental liability, and property transfer and other matters of private right" (Freyer, p. 26). These distinctions between the courts become important when confronting disagreements between the "slave" states and those states that did not allow slavery.

Fugitive Slave Laws

As early as 1643, colonists demanded regulation of fugitive slaves. In Massachusetts, for example, the New England Confederation (1643–1684) was founded in part to strengthen colonial cooperation in the return of fugitive slaves. After the Revolutionary War, Congress passed the Fugitive Slave Law of 1793, which gave legal support to masters seeking their fugitive slaves. In response, some states established *personal liberty laws* to protect citizens from slave catchers. Under these personal liberty laws, fugitives could testify before judges, and slave owners could

not seize fugitives without a warrant for their arrest. Congress revisited the issue in the Fugitive Slave Law of 1850.

The Supreme Court

Innumerable people have devoted their lives to pursuing civil rights. Three men, in particular, deserve deep respect and appreciation. The first is Supreme Court Chief Justice John Marshall. The others are Chief Justice Earl Warren and Supreme Court Judge Thurgood Marshall. Many other people were important to the civil rights movement, but these judges positively affected social change. These men developed the strategy and the model needed to pursue civil rights cases of all kinds. What is unique about these men? Or were they just fortunate enough to be at the right place at the right time, both politically and economically?

Chief Justice John Marshall

John Marshall was Chief Justice of the United States during the years 1801–1835. Chief Justice Marshall was politically active in Virginia and served in the House of Delegates (1782–1790, 1795–1796). He became a leader of the Federalist Party in that state and started his long-time political rivalry with Thomas Jefferson, who had fallen out with the Virginia Federalists. During his service in the House of Delegates, he participated in the Virginia Convention debates about the adoption of the U.S. Constitution. Patrick Henry spoke in opposition. Marshall was chosen to speak in favor of a strong judiciary. His views about the importance and power of a

strong federal judicial system were expressed clearly. President Adams asked him to become an Associate Justice of the Supreme Court, but Marshall refused. In 1799 he ran for a seat in the House of Representatives and won. His close alliance with President Adams continued, and in 1800 Adams appointed him Secretary of State. In January 1801, after loosing his re-election bid to Jefferson, Adams appointed Marshall Chief Justice of the United States. Justice Marshall recognized, and was trying to help others to recognize, that the new government had three branches: executive, legislative, and judicial.

John Marshall set precedents for the judicial branch of the federal government, precedents that are followed even today. During his time on the Court, he greatly strengthened the judiciary branch of the federal government and handed down many decisions of long-lasting significance based on a broad interpretation of the Constitution and a belief in the supremacy of national over state power. The role of the Supreme Court, in Marshall's view, was to interpret and enforce the Constitution in a way that stifled efforts of state legislatures to interfere with the constitutionally protected rights of individuals or combinations of individual. One method to limit state action was Marshall's use of the "contract clause" of the Constitution that prohibited a state from passing a law "impairing the obligation of contracts." Most importantly, after many negotiation sessions, the various compromises by the Federalists and the Anti-Federalists paved the way for Chief Justice John Marshall's doctrine of judicial review. The appointment of John Marshall as Chief Justice (1801–1835) of the United States led to a series of decisions

that further carved out the role for the Court, especially in defining the nature of the federal–state relationship, as well as the power of the Court. Over time many decisions were either reversed or watered down, but parts of each law survived as the country progressed toward a substantial and enduring nationalism and a strong federal government.

In 1803 in *Marbury v. Madison,* the Supreme Court under the leadership of Chief Justice John Marshall declared that the federal courts had the power to nullify acts of the states' governments when they were found to be in conflict with the Constitution. Marshall referred to Article III of the Constitution, which does not permit the existence of any statute that would be in conflict with the Constitution itself. Marshall wrote, "A law repugnant to the Constitution is void." This groundbreaking Supreme Court decision established some of the most fundamental doctrines of American constitutional law. *Marbury v. Madison* (1803), became a land mark case establishing the practice of *judicial review*—the assertion that the Court has the authority to judge the constitutionality of congressional laws and executive actions—by federal courts over acts of the other two branches of government. The ruling in the *Marbury v. Madison* case established the Court as the final arbiter of constitutional questions with the right to declare congressional acts void. *Marbury v. Madison* became known as "The Principle of Judicial Supremacy."

Throughout Marshall's tenure he was deeply concerned with preserving private property and individual rights; the enhancement of the prestige and power of the court; and the establishment of a strong, central, federal power. Animosity and

discord were abundant in Marshall's decision in *Marbury*; this was the first time the Supreme Court had asserted its right to judge the constitutionality of congressional acts. *Marbury v. Madison* would later serve as an important precedent for judicial review of federal statues. Rulings by the Marshall Court, such as *McCulloch v. Maryland* (1819) and *Gibbons v. Ogden* (1824), set the stage for later rulings upholding expansive federal powers. In *McCulloch,* Justice Marshall wrote,

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. Furthermore, this constitution, and the laws of the United States, which shall be made in pursuance thereof shall be the *supreme law of the land*.

Chief Justice Marshall invoked this phrase, "the supreme law of the land," to establish the right of Congress to pass laws that are "necessary and proper" to conduct the business of the U.S. government. Marshall dominated the nationalistic Court. The Marshall Court set many precedents, particularly in fields where the Constitution required elaboration. Marshall progressively broadened the constitutional powers of the federal government during his tenure. It is clear that the Supreme Court affects public opinion. The American public regards the Supreme Court as a powerful policy maker. Therefore, when Justice Marshall declared that an issue would be visited on the basis of "the supreme law of the land," he would follow through, even if there were a hostile reaction.

In *Gibbons v. Ogden* Marshall wrote, "When a federal and state law are in conflict, the federal law is supreme." This reasserted the Supreme Court's right to

review and overrule a state court decision. This case involved a dispute over a steamboat business. Gibbons had a federal permit for the steamboat business; Ogden had a state permit for the same waters. Siding with Gibbons, the Court said that, in matters of interstate commerce, the Supremacy Clause (Article VI) tilts the balance of power in favor of federal legislation. In spite of the Marshall Court decisions, strong debate continued in the United States over federal/national power versus state power. With the cases of *Martin v. Hunter's Lessee* (1816), *Fletcher v. Peck* (1810), and *Cohens v. Virginia* (1821), Chief Justice Marshall led the Supreme Court in rulings that established the Supreme Court's right to review and overrule a state court decision. These decisions were the first of many that established the superiority of the national government over state government, which continues to be debated. *Cohens v. Virginia* (1821), one of Marshall's cases, affirmed the power of the Constitution over the states. Marshall wrote in *Cohens v. Virginia*,

> One of the instruments by which this duty may be peaceably performed is the Judicial Department. It is authorized to decide all cases of every description arising under the Constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to each other; the nature of our Constitution; the subordination of the state governments to that Constitution; the great purpose for which jurisdiction over all cases arising under the Constitution and laws of the United States is confided to the Judicial Department, are we at liberty to insert in this general grant an exception of those cases in which a state may be a party? Will the spirit of the Constitution justify this attempt to control its words? We think it will not. We think a case arising under the Constitution or laws of the United States are cognizable in the courts of the Union; whoever may be the parties to that case. The Constitution gave to every person having a claim upon a state a right to submit his case to the Court of the nation. However unimportant his claim might be, however little the community might be interested in its decision, the framers of our Constitution thought it

> necessary, for the purposes of justice, to provide a tribunal as superior to influence as possible in which that claim might be decided. The judicial power of every well-constituted government must be coextensive with the legislative, and must be capable of deciding every judicial question which grows out of the Constitution and laws.

Marshall also foreshadowed the views he would express in later decisions. The Marshall Court set many precedents, particularly in fields where the Constitution required elaboration. More than any other lawyer, statesman, or judge, John Marshall is credited with establishing the authority of the Supreme Court as equal with the legislative and executive branches of the U.S. federal government. He died in 1835, remembered in history as the Chief Justice who—as a fellow judge Jeremiah Mason so aptly put it—kept things from "falling to pieces" in the commencement of this country (O'Connor, Sabato, Haag, & Keith, 2004, p. 24). Observers at the time related that Marshall molded the Court in his own image. Marshall helped move the Court from the fringes of power to the epicenter of constitutional government. Marshall progressively broadened the constitutional powers of the federal government during his tenure.

Roger B. Taney (1835–1863) was Marshall's successor. He took office while Jackson was president. During the Taney era, the comfortable role of the Court as the arbiter of competing national and state interests became troublesome when the Court was called upon to deal with the highly political issue of slavery. In cases such as *Dred Scott v. Sandford* (1857) and others, the Taney Court tried to manage the slavery issue by resolving questions of ownership, the status of fugitive slaves, and slavery in the new territories. These cases generally were settled in favor of slavery

and states' rights within the framework of dual federalism. Dual federalism holds that the national government should not exceed its enumerated powers expressly set out in the Constitution. It is the opinion of many that the treatment of slavery by the Taney Court erred grievously and thereby accelerated the coming of the Civil War, since its decisions seemed to rule out any political legislative solution to slavery by the national government.

Dred Scott, born into slavery around 1795, became the named plaintiff in a case that was to have major ramifications on the future of the federal system. In 1833 Scott was sold by his original owners in St. Louis, Missouri. The next year he was taken to Illinois and later to the Wisconsin Territory, returning to St. Louis in1838. When his owner died in 1843, Scott tried to buy his freedom. Upon his owner's death, Scott was left in the custody of his first owners, who believed that his residence in Illinois, and later in the Wisconsin Territory, which both prohibited slavery, made Scott a free man. Scott's owners subscribed to, "Once free, always free."

After many delays, the U.S. Supreme Court ruled that Scott was *not* a citizen of the United States. Taney wrote in the *Dred Scott v. Sandford (1857)* ruling, "Slaves were never thought of or spoken of except as property of their masters…and the Constitution does not consider slaves to be U.S. citizens." Writing for the majority in the *Dred Scott v. Sandford* case, Chief Justice Taney concluded that Congress lacked the constitutional authority to bar slavery in the territories. He concluded, "The Negro might justly and lawfully be reduced to slavery for his benefit." Taney held that Scott had never been free at all, and cited the Constitutional grounds for placing the slavery

decision in the hands of the states. Judge Taney authored this opinion—one of the most important and despised in this nation's history. Additionally, in the *Scott* case, the Court ruled unconstitutional the 1820 Missouri Compromise, which prohibited slavery north of the geographical boundary at 36 degrees latitude on a map of the United States. Congress later revisited the Missouri Compromise in the Kansas-Nebraska Act in 1854.

Civil War and Reconstruction

All was altered by the arrival of the Civil War (1861-1865). Lincoln had tried to prevent the Union from dividing itself. However, December, 1860, South Carolina seceded and soon other states followed: Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas. The states met and created the Confederate States of America. Lincoln now faced a divided nation, but he truly believed that the Union was "perpetual" and indissoluble. The first shot of the Civil War was fired in April 1861 at Fort Sumter. As Lincoln had predicted, "the house had fallen." Other states joined the secession, Virginia, North Carolina, Tennessee, and Arkansas.

The Civil War was the most costly and brutal struggle in which American soldiers have ever been engaged, many times brother against brother. More American servicemen died in that war (618,000) than in the two world wars and Vietnam combined. Approximately one-fourth of the slaves in the South gained their freedom under the terms of the Emancipation Proclamation. The South thought that the Emancipation was depriving the South of an important part of its agriculture

workforce. Economic recovery of the South could not even begin until a new labor system replaced slavery. The Civil War left the South devastated, demoralized, and destitute. Thus, the liberty of thousands of African Americans lay in the lap of a terribly biased administrative, rather than judicial, process. Additionally, Southern defensiveness led Southerners to fear that the nonslaveholding majority would turn against them and the solidarity of Southern Whites behind the "peculiar institution" would crumble. Slavery, as was known at that time, was dead, but what this meant for future relationships between Whites and Blacks was still in doubt. What the war definitely resolved was that the federal government was *supreme* over the states and had a broad reach of *constitutional authority*, even though over the next few years, things would not look this way.

President Lincoln issued his preliminary Emancipation Proclamation in 1862. This proclamation gave the Confederate states 100 days to give up the struggle without losing their slaves. Having received little response, President Lincoln went ahead in January 1863 and declared in his Proclamation of Amnesty and Reconstruction that all slaves in those areas under Confederate control "shall be…thenceforward, and forever free." Lincoln pushed hard to get Congress to pass the Thirteenth Amendment in 1865. At enormous human and economic cost, the nation had emancipated 4 million African Americans from slavery, but the nation had not yet resolved that they would be equal citizens. The nation that emerged from 4 years of total war was not the same America that had split apart in 1861.

Reconstruction aroused violent controversy over congressional powers of the federal government to intervene in a state's affairs, over whether the victors should try to change the South fundamentally, and over the status of the Black ex-slaves, or Freedmen. Political affiliations were a key determinant of views on those issues. For example, Northern Democrats believed the Constitution strictly limited federal power, anticipated that most Southern Whites would vote Democratic, and had little sympathy for Black aspirations. They favored a rapid Reconstruction that would make few demands on the ex-Confederates. Reconstruction left a nasty legacy to future generations of Southern Americans. White Southerners felt deeply wronged (many still do), and they perceived Blacks for the next 100 years as potentially dangerous political enemies. By failing to persevere in Reconstruction, Northerners permitted the creation of a caste system in the South that deprived Black Americans.

During the Congressional Reconstruction period, Congress was in a position to implement its own plan of Reconstruction. The first Reconstruction Act, passed over President's Johnson's veto in March 1867, placed the South under military rule and reorganized the region into five military districts. Subsequent acts were passed in 1867 and 1868. Constitutional Amendments Thirteen, Fourteen, and Fifteen, known as the "Civil War Amendments," were passed. President Lincoln fought hard for the Thirteen Amendment, and it was ratified in 1865. Section 1 of this amendment stated, "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The Fourteenth Amendment was ratified in 1868:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws….The Congress shall have power to enforce, by appropriate legislation, the provisions of the article.

The Fifteenth Amendment, known as the Black Suffrage Amendment, was ratified in 1870: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The intent of these three Amendments was clear. However, it would be years (due to states' trying to get around these) before citizens actually believed that they could depend on the backing of these Amendments. In fact, these Amendments continued to be attacked.

After the conclusion of the Civil War the states were required to ratify the Thirteenth Amendment for readmission to the Union. However, without regard to the Thirteenth Amendment, most of the former Confederate States quickly passed laws/codes that were designed to restrict opportunities for newly freed slaves. These *Black Codes* prohibited Blacks from voting or sitting on juries; unemployed Blacks could be arrested, fined for vagrancy, and prohibited from even appearing in public places. Punishment for code violations was most often prison.

Antebellum Southern laws—Black Codes—that regulated free Blacks and the laws of northern states designed to do the same furnished the model for regulation of Black civil rights. Directives of the Freedmen's Bureau (established to assist Blacks in their adjustment after the war) and the legislation of other Southern states supplied examples of statutes that attempted to control Black labor. Laws designed to reestablish control over Black workers were more complex, since the legislature faced the problem of securing this goal without restoring slavery. The result was a set of interrelated statutes that gave local authorities and landowners the ability to *coerce free labor with the threat of forced labor*. Although many of these laws made no specific mention of race, they primarily were aimed at and enforced against Blacks.

The apprenticeship laws, vagrancy laws, and convict-labor laws provided the key means of intimidating freedmen. A vagrancy law allowed local courts to arrest people whom they defined as idle, fine them, and contract their labor if they could not pay the fine. Under this law minor vagrants could also be apprenticed. Local courts received the power to put such convicts to work at any type of labor until the fine was paid. Local authorities received even more power by a law that authorized them to put to work at any employment persons sentenced to county jails for any misdemeanor or petty offence.

Outraged by the enactment of the Black Codes, which looked suspiciously like slavery under a new guise, the Reconstruction Congress enacted the 1866 Civil Rights Act (and later the 1871 Enforcement Act), which granted removal rights to litigants as did the Habeas Corpus Act of 1863, which afforded some protection by

removal of suits to federal court. The purpose of the acts was to invalidate some of the state Black Codes. President Andrew Johnson vetoed the legislation, but Congress overrode the presidential veto. The Civil Rights Act formerly established the citizenship of Blacks and gave Congress and the federal courts the power to intervene when states attempted to restrict citizenship rights. The Separable Controversies Act of 1866 expanded this access. Finally, in 1875 the Civil Rights Act, Jurisdiction and Removal Act gave the federal courts broad removal jurisdiction. The national government now had the authority to respond to a wide range of public and private actions within the states. This action upset the Southern states as they were of the opinion that the issues fell within their state courts, which they could control. They felt the need to require more rigidly institutionalized systems of control. The Jim Crow laws were a response to the new reality, which developed a rigid, legal, and institutional basis to retain control over the Black population by White supremacy. What had shifted was not their commitment to White supremacy but the things necessary to preserve it, such as sitting together on public transportation or interracial marriage. Jim Crow came to personify the system of government-sanctioned racial oppression and segregation in the United States.

A series of Supreme Court decisions between 1875 and 1896 gutted the Reconstruction amendments and the legislation passed to enforce them, leaving Blacks virtually defenseless against political and social discrimination without federal protection. By 1883, The U.S. Supreme Court continued to strike down the foundations of the post–Civil War Reconstruction, declaring the Civil Rights Act of

1875 unconstitutional. After the Civil Rights Act of 1866 was damaged, the Court had passed the Civil Rights Act of 1875 and then the Civil Rights Cases of 1883. The Civil Rights Cases of 1883 provided a moral reinforcement for the Jim Crow system by stating that Congress could not punish private individuals for acts of racial discrimination. Southern states viewed the ruling as an invitation to gut the intent of the Thirteenth, Fourteenth, and Fifteenth Amendments.

During this same era of devolution, the Supreme Court ruled that the Fourteenth Amendment prohibited state governments from discriminating against people because of race, but did not restrict private organizations or individuals from doing so. Thus railroads, hotels, theaters, and the like legally could practice segregation. Eventually, the Court also validated other state legislation regarding Jim Crow that discriminated against Blacks for "consorting" with members of another race. The most common types of laws ordered business owners and public institutions to keep their Black and White clientele separated. Multiple Jim Crow laws were simply enhanced extensions to the Black Codes; they varied from jurisdiction to jurisdiction. For example, wardens in the prisons were to see that the White convicts had "separate apartments for both eating and sleeping from the Negro convicts." Jim Crow Laws and Black Codes infiltrated every aspect of life.

By the 1890s the gains of Reconstruction were mostly stripped away through Supreme Court decisions. The prior progress that had been made in civil rights legislation crumbled away. In 1896 the Supreme Court legitimized the principle of "separate but equal" in its ruling *Plessy v. Ferguson*. Jim Crow laws were tested in

1896 by Homer Plessey. When Plessy was convicted in Louisiana for riding in a white only railway car, Plessey took his case to the Supreme Court but the justices voted in favor of having the case heard in the Louisiana Court. The ruling established the legality of segregation as long as facilities were kept "separate but equal." Only one of the justices, John Harlan, disagreed with this decision. The Court held that separate accommodations did not deprive Blacks of equal rights if the accommodations were equal. Furthermore, after the Court's decision in *Plessy v. Ferguson* (1896), in which the Court ruled that state maintenance of "separate but equal" facilities for Blacks and Whites was constitutional, most civil rights and voting cases became state matters, in spite of the Civil War Amendments (1896). In 1899, the Court went even further declaring in *Cumming v. County Board of Education:* Laws establishing separate schools for Whites were valid even if they provided no comparable schools for Blacks. (The world had forgotten the progress Blacks had made and now to have it taken away.)

Progressivism, World War I, the Great Depression, and the New Deal

Over the next 50 years multiple events greatly influenced policy affairs. Progressivism (1890–1954) began in the cities during the 1890s. Advocates and progressives knew they would continue to fight for social justice. The focus was back changing economic, social, and cultural forces. The era was characterized by a concerted effort to reform political, economic, and social affairs. It first took form around settlement workers (and homes like Jane Addams' Hull House) and others

interested in freeing individuals from the crushing impact of the cities and factories. Social workers, ministers, intellectuals, and lawyers joined in the social-justice movement that focused on tenement house laws, more stringent child labor legislation, and better working conditions for women. The Supreme Court finally began to chip away at the Jim Crow laws. In *Guinn v. United States* (1915), the Court supported the position that a statute in Oklahoma law, denying the right to vote to any citizen whose ancestors had not been enfranchised in 1860 (grandfather clause), was unconstitutional. In *Buchanan v. Worley* (1917), the Court struck down a Louisville, Kentucky, law requiring residential segregation. By World War I, even the armed forces and places of employment were still segregated, and it was not until after World War II that an assault on Jim Crow in the South began to make headway. For example, in 1950 the Supreme Court ruled that The University of Texas must admit a Black student, Herman Sweatt, to the law school, on the grounds that the state did not provide equal education for him.

Following the Progressive Era was World War I. During WW I the migration of Blacks to the north continued in unprecedented numbers. In the postwar economic slump, the scramble for jobs aggravated already existing racial tensions, and violence erupted across the country. An unintended consequence was that hundreds, perhaps thousands, of Blacks were murdered by Whites and by members of the Ku Klux Klan. Urban slums, job discrimination, disenfranchisement, and segregation brought on Black disillusionment with White America once again, if it had ever declined. The war and its aftermath damaged the humanitarian, progressive spirit of the early years.

The war killed something precious, and perhaps irreparable, in the hearts of thinking men and women. The war drained people's energy and enthusiasm.

By 1914 every Southern state had passed laws of segregation that created two separate societies: one Black, the other White. Blacks and Whites could not ride together in the same railroad cars, sit in the same waiting rooms, use the same restrooms, eat in the same restaurants, or sit in the same theaters. Blacks were denied access to parks, beaches, and picnic areas; they were barred from many hospitals. What had been maintained by custom in the rural South was to be maintained by law in the urban South. A majority of states now enforced segregation through Jim Crow laws, from Delaware to California, and from North Dakota to Texas, many states (and cities) could impose legal punishments for violations. The pendulum had swung a long way from the Civil War Amendments and the beliefs and goals of Abraham Lincoln. Slavery had returned, especially within the Southern plantation-style prisons.

On the heels of WW I came the Great Depression. The Great Depression that followed the crash of 1929 was the most devastating economic blow ever suffered by the nation. The downward economic spiral continued for 4 years. Children grew up thinking that economic deprivation was the norm rather than the exception. The Great Depression left enduring psychological scars—never again would the Americans who lived through it be quite so optimistic about their economic future. It would be difficult to measure the human costs of the Great Depression.

President Franklin D. Roosevelt's New Deal produced an outburst of new laws. New Deal programs forced all levels of government to work cooperatively with

one another. For the first time in U.S. history, all levels of government were embraced as equal partners in an intergovernmental system. This relationship between the national and state governments that began with the New Deal was called *cooperative federalism.* Roosevelt's New Deal programs increased the flow of federal dollars to the states. These grants eventually made the imposition of national goals on the states easier (in essence, they bought their way in).

Many citizens feared that the New Deal would make the national government too big and expensive and would bring too much regulation of business and too much social welfare legislation. The New Deal did help Blacks, but it never tried to confront the racial injustice built into the federal relief programs. The best friend that Blacks had in the government during this time was Harry Hopkins, a social worker in Roosevelt's cabinet. Hopkins was able to help provide assistance to 40% of the nation's Blacks. Their other friend was First Lady Eleanor Roosevelt, who spent years fighting for social justice.

Franklin D. Roosevelt proposed a variety of innovative programs under The New Deal. He had to utilize the full power of the office of President as well as his highly effective communication skills to sell the public and Congress on this whole new ideology of government. The new programs propose by Roosevelt, and passed by the Congress, in the beginning were to bolster the people's confidence in the national government. These programs tremendously enlarged the scope of the national government. Those who disagreed with Roosevelt's unprecedented use of national power quickly challenged the constitutionality of New Deal programs in

court. Through the mid-1930s the Supreme Court ruled that certain aspects of the New Deal went beyond the authority of Congress. Roosevelt and the Congress were outraged. Roosevelt's frustration with the laissez-faire attitude of the Court prompted him to suggest what became known as his "Court-packing plan." Franklin Roosevelt suggested that the Supreme Court be enlarged from nine justices to 13 justices. He would then be able to name the new judges. The plan did not pass.

World War II

The Japanese attack on Pearl Harbor brought the United States into World War II, which immediately pushed domestic policies clear into the background. Only a few people realized what the impact of 4 years of war would be on virtually every aspect of their lives. World War II did bring the nation out of the Depression. When President Roosevelt died in 1945 the nation mourned the man who gallantly had met the challenge of the Depression and global war.

At the death of Roosevelt, Harry Truman became President and stepped into the office with little knowledge of what had been going on. Roosevelt had not shared much with his vice-president from Missouri. World War II raged on as Truman took command of the Presidential office. Truman obviously had a lot on his plate, especially the war. It was not long before Germany surrendered; the United States dropped atomic bombs on Hiroshima and Nagasaki, and Japan surrendered.

The Cold War

In the midst of all that was going on, Truman delved into looking for ways to alter the historic pattern of racial discrimination in the United States. Truman was the first president to attempt this. However, Truman's recommendations were tossed into the "do when have time" pile by legislators. Most of the country had their eyes focused on the Cold War. During the ongoing Cold War, the United States had turned its focus to fighting communism, while Blacks and other minority groups were still seriously disadvantaged groups. Many had moved to the North for better jobs. In the South conditions were much worse than in the North. Jim Crow laws were epidemic.

In 1946 Truman appointed a presidential commission on civil rights. The commission made several recommendations but Truman was not able to get pass the Southern resistance to get the Congress to vote for the recommendations. In 1949 Truman tried again to pass his civil rights legislation through Congress, but failed. Even though President Truman had not been able to secure significant legislation, he had succeeded in adding civil rights to the liberal agenda. However, Truman did use his executive power to strengthen the civil rights division of the Justice Department, which would aid groups in their efforts to challenge school segregation and restrictive housing covenants in the court. Most important, Truman issued an order calling for the desegregation of the armed forces. Social change was happening, but incrementally.

President Truman was re-elected by a slim margin in 1948. In 1948 President Harry Truman infuriated the South by ordering an end to racial discrimination in

federal hiring, to end segregation in the armed services, calling for an antilynching law, elimination of the poll tax as a suffrage requirement, and the creation of a Fair Employment Practices Committee. President Truman's friend, Chief Justice Earl Warren Segregation was enforced at all places of public entertainment, including libraries, auditoriums, circuses, and schools. There was segregation in the hospitals, prisons, mental institutions, and nursing homes. Even ambulance service was segregated **(**Cray, 1997).

The Republicans regained power in 1952 with the election of Dwight Eisenhower, the first Texas-born President. The Cold War persisted, like a dark cloud hanging over the American citizens. A lot of books were published that reflected the mood of society, such as William Whyte's, *The Organization Man,* David Riesman's *The Lonely Crowd*, and Jack Kerouac's novel *On the Road.*

Eisenhower faced many challenges: the Cold War, Vietnam after the fall of Dien Bien Phu, the seizure of the Suez Canal by Gamal Nasser, dealing with Ho Chi Minh in Vietnam, and the "war that was not happening" in Laos. Additionally, during Eisenhower's term the Central Intelligence Agency (CIA) was the leader in overthrowing the elected leader in Iran and replaced him with the Shah. The CIA replaced the regime in Guatemala. Eisenhower accepted the domination of the Soviets over East Germany and Hungry. Fidel Castro took power in Cuba after the revolution. In 1953 Eisenhower appointed Earl Warren, a Republican, as Chief Justice of the United States in 1953. Warren joined John Marshall and Thurgood Marshall as the Supreme Court justices perhaps the most influential in U.S. social justice.

Chief Justice Earl Warren

Chief Justice Earl Warren (1891-1974) served on the Supreme Court 1953–1969. The Warren Court inaugurated the expansion of legislative powers of the judiciary, which was beyond Eisenhower's cognizance. Not everyone was thrilled with Warren's appointment. However, little did people realize what Warren was about to accomplish, and in which direction he would steer the court. Warren was a more liberal justice than Eisenhower or others had anticipated.

Earl Warren was Chief Justice during one of the most turbulent times in U.S. history. In 1953 Warren took over a court that was deeply divided between those justices who advocated a more active role for the court and those who supported judicial restraint. Judicial restraint is a philosophy of judicial decision making that argues that courts should allow the decisions of other branches of government to stand. Throughout Warren's tenure, the Supreme Court dealt with controversial cases on civil rights, civil liberties, and the very nature of the political system. He proved skillful at handling the court and securing consensus, as is evidenced by the unanimous decision in the *Brown v. Board of Education* case in 1954. The lead attorney for the plaintiff was soon-to-be Justice Thurgood Marshall. The *Brown* case was the first in a long string of court opinions by the Warren Court that marked a more active role for the U.S. Supreme Court. Warren believed that the Constitution prohibited the government from acting unfairly against the *individual*. In taking this

position, he carved out a powerful position for the Court as a protector of civil rights and civil liberties (Cray, 1997).

The Warren Court took on the defense of individual rights as no court before it. Warren considered the proper role for the courts was for the judiciary to be active and definitely not inferior to the other two branches of government. Judge Warren's contributions to the civil rights movement were extensive. Warren and Marshall contributed beyond the normal call of duty to the civil rights movement. Chief Justice Earl Warren, along with Thurgood Marshall and his team who represented the NAACP, were able to craft a long series of unanimous decisions including *Brown v. Board of Education* (1954), which overthrew the segregation of public schools; "one man one vote," which dramatically altered the relative power of rural regions in many states; and Miranda rights from the case *Miranda v. Arizona*, (1966), which required that certain rights of a person being interrogated, while in police custody, be clearly explained, including the right to an attorney, and the right to keep silent. The Chief Justice fashioned a constitutional revolution in the application of the Bill of Rights to the states in the generous interpretation of specific provisions of criminal justice safeguards for the individual; in the application and interpretation of the Civil War amendments; in the liberalization of the right to foreign travel, to vote, to run for office, and to fair representation; in an elevated commitment to freedom of expression; and in many other sectors of the freedom of the individual.

Warren's opinion in *Brow*n is intriguing due to its lack of constitutional analysis. In *Brown*, Warren's key finding did not appeal to precedent or to the history

of the Fourteenth Amendment. Rather, as in all of Warren's rulings, he emphasized common sense, justice, and fairness. Warren said in response to some of his critics: "Everything I did in my life that was worthwhile I caught hell for," and "It is the spirit and not the form of law that keeps justice alive" (Cray, 1997, p. 219).

Warren did not manifest immediately the activism that would eventually result in all-out assaults on the Court. His opponents distributed "Impeach Earl Warren" bumper stickers and "Warren Impeachment Kits." By mid-1956 it had become crystal clear that, as Chief Justice of the United States, Earl Warren was in the process of providing leadership for an activist approach to public law and personal rights that went far beyond the Eisenhower brand of progressive Republicanism.

The appointment of Supreme Court Justice Earl Warren appeared to be a death warrant to Jim Crow. The next shock against the Jim Crow system of racial segregation was struck in 1954 by the Supreme Court's decision in *Brown v. Board of Education* of Topeka, Kansas, which declared segregation in the public schools unconstitutional. Thurgood Marshall and his team of NAACP lawyers argued that even substantially equality but separate schools did profound psychological damage to African American children and thus violated the Fourteenth Amendment. The Supreme Court was unanimous in its 1954 decision in the case of *Brown v. Board of Education of Topeka*. However, Warren realized it would be difficult to change historic patterns of segregation quickly. As was expected, in 1955 the Court was forced to rule again in the *Brown* case that implementation of integrating the schools should proceed "with all deliberate speed" but still left the details to the lower federal

courts (*Brown II*). The process of desegregating the schools proved to be agonizingly slow. Despite the snail's pace of school desegregation, the *Brown* decision led to other advances.

Warren continued to lead the Court through various battles for civil rights. Experts all agree that Warren was the Chief Justice *par excellence*—second in institutional leadership greatness only to John Marshall (no relationship between the two). Like John Marshall he understood and utilized the tools of pervasive and persuasive power leadership available to him; he knew how to bring men together, how to set a tone, and how to fashion a mood. He was his Court, "the Court." Chief Justice Earl Warren said,

> No, the democratic way of life is not easy. It conveys great privileges with constant vigilance needed to preserve them. This vigilance must be maintained by those responsible for the government. And in our country those responsible are, *we the people*, no one else. Responsible citizenship is therefore the…anchor of our republic. With it we can withstand the storm. Without it, we are helplessly at sea. (cited in Cray, 1997, p. 302)

After *Brown,* in 1957, President Eisenhower's (1952–1960) administration proposed the first general civil rights legislation since the Reconstruction. As was predicted, it met strong Southern resistance. President Eisenhower, however, successfully created a permanent Commission for Civil Rights Act, one of President's Truman's original goals. The act also provided for federal efforts aimed at "securing and protecting the right to vote." A second civil rights act in 1960 slightly strengthened the voting rights section. The attempt to ensure voting rights in the South was largely symbolic. Yet the actions of Congress and the Supreme Court

marked a vital turning point in national policy toward racial justice. Incrementally, the situation for minorities improved. When *Brown* first passed it seemed as though that this would mark the beginning of the "Civil Rights Movement," and the beginning of the end of the Jim Crow Laws.

Blacks in the South learned to use legal suits, mass sit-ins, and boycotts to hasten desegregation by placing an emphasis on the movement and *Brown.* A March on Washington led by Dr. Martin Luther King and attended by over 200,000 in 1963 dramatized the movement to end Jim Crow. The reaction of Southern Whites often included violence making it necessary to call in federal troops to preserve order and protect Blacks, notably at Little Rock, Arkansas (1957), Oxford, Mississippi (1962), and Selma, Alabama (1965). It looked promising to those who had fought segregation when the NAACP lawyers convinced the Supreme Court to reverse the doctrine of "separate but equal" in *Plessy v. Ferguson*. Other court cases did follow *Brown*, along with ground-breaking federal legislation, incrementally.

In 1960 civil rights became a significant issue. The historical events and social movements of the 1960s changed the federal court system. The litigation rate increased due to the social and political protest movements as well as to the "due process revolution" spawned by activists and by the social and procedural legislation of the 1960s. Civil rights advocates began asserting a need for favorable judicial interpretations and the expansion of federal government programs under President Kennedy and then President Johnson. This new movement began to transform the type of cases coming before the federal courts. More public cases were filed, resulting

in crowded dockets. Additionally, these cases were larger, more complex, and more limiting for lower federal courts because they were supported by Supreme Court directives. The sharp rise in demand for services of the courts was the greatest since the New Deal and post–World War II period.

The Federal District courts were confronted with unprecedented changes and demands. Basic litigation is the constitutional requirement for procedural due process, which means all accused people must be tried in accordance with legal procedures, not by arbitrary procedures. Over a period of time federal judges have established their role as interpreted through the provisions of the U.S. Constitution and state constitutions, and those interpretations establish the procedures that must be followed, whether the issue is public education, segregation, or prisoner rights. An important note at this point is that the federal courts became *principle change agents* of the nation's prisons as sanctioned by the Supreme Court.

Second Reconstruction

This activism was the heart of the Civil Rights Movement, so the era earned the title of Second Reconstruction because it continued the Civil Rights revolution begun by Congress and embodied in the Thirteenth, Fourteenth, and Fifteenth Amendments passed after the Civil War. Yet, even if Jim Crow is legally buried, the belief in White superiority and the legacy of segregation and racial discrimination still lives on in the hearts, minds, and actions of many Americans. The recurrent outbreaks of race riots in American cities are telling reminders that voting rights and integration

of public schools represent only part of the solution to the problem of race in America. Indeed, the lack of equal access by African Americans to adequate and rewarding jobs, quality education, and affordable housing strongly suggests that the spirit of Jim Crow still haunts the social and economic landscape of the American nation and Texas. This attitude currently haunts the nation's prisons as well, which are filled mostly by African Americans (as shown in Figures 1 and 2).

The new militancy of Black Americans in the post war era ushered in the transition from segregation to civil rights. The NAACP had supported numerous legal battles from the 1920s forward—usually local litigation and investigations of lynching, challenging the unequal facilities of state institutions, and laying down a body of legal precedents used by the courts in the 1950s. These actions became part of the model for others to continue to push for civil rights. In 1944, the Supreme Court struck down the "White primary" of Houston, Texas, a measure used to exclude Blacks from the Democratic Party primaries in the South. The number of southern African Americans registered to vote rose from 150,000 in 1940 to more than a million by 1952.

Supreme Court Justice Thurgood Marshall

The third judge who acted as an important component in the civil rights movement was Supreme Court Justice Thurgood Marshall (1908-1993), appointed by President Lyndon B. Johnson in 1967. Students of history and politics should enjoy

reading about this period with both Chief Justice Warren and Supreme Court Justice Marshall transacting business on the same court.

Marshall's greatest concerns and commitments were equal protection of the law, First Amendment cases, constitutional interpretation of civil rights and liberties, and racial segregation. Thurgood Marshall is one of the most well-known figures in the history of civil rights in America and the first Black Supreme Court Justice. He served on the Court for 24 years until June 28, 1991, when he announced his retirement due to advancing age and deteriorating health. He passed away January 24, 1993.

Marshall's life was a reflection of the changing 20th century. It began in a segregated town of ordinary people in Baltimore in 1908. Marshall would later say that everything he knew about the law Charles H. Houston of Harvard's Law School had pounded into his head.

> He taught us with an emphasis on the Constitution, Marshall recalls. And basically, he said you had to be not as good as the average White lawyer, you had to be better, because you wouldn't get a break on an even basis. He would tell us that the secret was hard work and digging out the facts and the law. Marshall says Houston's message to him was that *lawyers were to bear the brunt of getting rid of segregation,* and he made public statements that we would become social engineers rather than lawyers. (Williams, 1998, p. 96)

Juanita Mitchell, a NAACP activist in Baltimore, had fond memories of Marshall in the lawsuit against the University of Maryland:

> The colored people in Baltimore were on fire when Thurgood did that. They were euphoric with victory….We didn't know about the Constitution. He brought us the Constitution as a document like Moses brought his people the Ten Commandments. (Williams, 1998, p. 98)

When Marshall's friend, Charles Houston, stepped down as director of the NAACP, Marshall inherited the job. Marshall served as legal director of the NAACP 1940–1961. This was a pivotal time for the organization, as overturning racial segregation was one of its prime directives, as it was Marshall's. Marshall, along with his mentor Charles Hamilton (the first Black lawyer to win a case before the Supreme Court) developed a long-term strategy for eradicating segregation in schools. Their plan was to first concentrate on graduate and professional schools, believing that White judges would be more likely to sympathize with the ambitious young Blacks in those settings. Marshall's team won more and more cases; they then turned toward elementary and high schools.

Any Black man who stood up for his rights put his life in danger. Marshall traveled the country using the Constitution to force state and federal courts to protect the rights of Black Americans. The work was hazardous, and Marshall frequently wondered if he might not end up dead or in the same jail holding cell with those he was trying to defend. Marshall watched many of his clients ushered out of the courtroom to spend years in prison despite their innocence. Many of the risks Marshall took paid off in a mass of legal precedents. Some of the precedents that Marshall successfully accomplished were to establish the end of the use of racially restrictive covenants to keep Blacks from buying houses; he argued the case that ended the all-White primary system in Texas. Marshall had already garnered such a reputation among Blacks that during the Texas case Duke Ellington stopped his tour

for a week to sit in the courtroom and watch Marshall in action. He won cases calling for Black teachers to be paid salaries equal to those of Whites.

Marshall led a team that skillfully understood and utilized the Constitution, which has been his main tool, in an unprecedented way to dismantle the world of "separate but equal." Marshall's efforts culminated in the landmark 1954 decision *Brown v. The Board of Education*, in which he was the lead lawyer, in front Chief Justice Earl Warren and his Court, which declared segregation of public schools illegal and that segregation, caused psychological damage to the Black children

Marshall heard that President Eisenhower had pressured Chief Justice Earl Warren to retain school segregation. Marshall says that Ralph Bunche, former U.S. Undersecretary to the United Nations, told him that at a White House dinner he heard Warren tell Eisenhower off in no uncertain terms: "I thought I would never have to say this to you, but I now find it necessary to say to you specifically: You mind your business, and I'll mind mine." Later, Marshall said Eisenhower's attempt to pressure Warren was the "most despicable job any president has done in my life" **(**Williams, 1987, p. 13).

When Warren read the *Brown* opinion, the decision was unanimous. Marshall would later comment that the *Brown* decision "probably did more than anything else to awaken the Negro from his apathy to demanding his right to equality" (Williams, 1987, p. 56)

Civil Rights Litigation

The birth of the courts' institutional reform movement can be traced to *Brown v. Board of Education* requiring desegregation of the public schools in the 1950s during the beginnings of the civil rights movement. It became clear that the responsibility would have to fall on federal courts to defend minorities against majorities.

The prototype for the judiciary's new litigation role has been the school desegregation decree in *Brown v. Board of Education* (1955). In *Brown*, the Supreme Court set the precedent for the series of reform cases when it determined that racial segregation in public schools was a violation of constitutional doctrine of equal protection under the laws. The *Brown v. Board of Education* cases I and II and others that followed provided federal courts with an arsenal of equitable remedies to desegregate public schools and set the stage for enlarging the scope of judicial involvement in social and political affairs. Between 1955 and 1960, Marshall's legal team at the NAACP filed seven major cases dealing with the right of Black children to an education. In 1957 he represented nine Black students in Little Rock, Arkansas, who tried to integrate Central High School. Marshall found himself challenging segregationists Governor Orval Faubus and Arkansas moderate Senator J. William Fulbright (who filed a brief with the court opposing desegregation because it might create "disruptive conditions"). Marshall, in his arguments to the court, countered; "Even if it be claimed that tension will result which will disturb the educational

process, this is preferable to the complete breakdown of education which will result from teaching that courts of law will bow to violence" **(**Patterson, 2001, p. 89).

The school cases proved that traditional equity powers could be expanded to accommodate new circumstances, which had been subject to the "hands off" doctrine (Dilulio, 1990, p. 174). The broad assumption of equitable authority provided a federal judge with the power to assure compliance with the courts' decrees and thus made judicial remedies equally as significant as those provided through legislative initiative (Sturm, 1993). This ruling set the context in which all persons have a right to be heard and no one will be denied access to the legal system. Do these individual rights apply to people within the TDCJ?

Like the school desegregation cases that preceded them in the 1950's and 1960's, the prison reform suits were usually brought as class actions, involving complex socio-economic and political considerations. As such, their impact extended beyond the confines of the litigation to involve all members of the surrounding community. The demands of the plaintiffs addressed the correction of the immediate violations, and underscored the need for substantive changes in state correctional policies.

Primarily as part of the "hands-off" doctrine, the judiciary did not wish to hear cases if the result would be "unenforceable" decrees. It was the practice of the courts to limit the scope of decrees to situations where adequate and timely compliance would be anticipated; customarily, court orders were followed without active judicial participation. Judges were hampered by lack of time, inadequate supervisory

mechanisms, and insufficient funding and expertise in cases that dealt with systemic problems. Institutional reform cases usually involved tangled disputes over the prevalence of certain conditions or practices, the correct standards to be applied, the degree of progress made by the defendants before or during the lawsuit, and alternative approaches for providing the service.

Since the 1950s there have been two basic categories of prisoner litigation. The first challenges the fact of the inmate's detention. These are typically filed under federal *habeas corpus* legislation. The second category of suits is based on civil rights statues, particularly the U.S. Civil Rights Statute, Section 1983 (1877). Section 1983 was enacted after the Civil War to protect freed slaves from potential civil rights abuses. This act precludes any state official from depriving persons of their constitutionally protected rights under the law.

Institutional Reform Litigation

In the wake of the *Brown* decision, beginning in the 1960s, federal courts became deeply immersed in institutional reform litigation involving schools, prisons, mental hospitals, and other institutions. The reforms, appearing as judicial decrees, arose from those within the institutions (school children, inmates, and mental health patients) charging violation of basic constitutional rights.

President John Kennedy appointed Marshall to the United States Court of Appeals for the Second Circuit in 1961. From 1961 to 1965, Marshall managed to write 112 opinions on that court, none of which were overturned on appeal. In fact,

several of his dissenting opinions were eventually adopted as majority opinions by the Supreme Court.

By the early 1960s, there was almost a progressive air surrounding concerns about the poor and minorities. As concerns rose and as states (especially in the South) were blamed for perpetuating discrimination, those in power saw grants as a way to force states to behave in ways desired by the national government. If the states would not cooperate with the national government to further its goals, the government would withhold funds. Withholding funds in essence again made it very clear that federal policy takes precedence over the state policy. This was most clear in the administration of President Lyndon B. Johnson and his "Great Society" programs which included the "War on Poverty." The new grants altered the federal–state balance that had been at the core of older federal grant programs. During President Johnson's administration, the national government began to use federal grants as a way to ensure enactment of the bills, such as the Equal Employment Opportunity Commission. Johnson hoped to be able to get some of the legislation passed that President Kennedy had wanted to accomplish. Kennedy had the charisma, but Johnson knew how to play ball in Congress.

As part of his "Great Society" program, President Johnson passed the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 with the hope that these would finally end the legal sanctions to Jim Crow. With the passage of the Voting Rights Act, legalized segregation and the disfranchisement of African Americans was finally ended, at least on paper. It had taken almost 100 years

of resistance to terror and discrimination to achieve what had been promised to African Americans at the end of the Civil War. The struggle from terror to triumph had not been an easy victory, but it was a war valiantly fought—and it was a war in which justice ultimately prevailed, or will. One caveat to the victory was that President Johnson and Senator Ralph Yarbrough from Texas both placed their careers on the line for this vote. They would be voting against their Southern conservative constituencies. Johnson stated to a friend after the passage of the bill, "I think we just delivered the South to the Republican Party for a long time to come" (Campbell, 1989, p. 435). Johnson went on to pass multiple bills including The Texas College and University System Coordinating Board (whose name was changed in 1987 to Texas Higher Education Coordinating Board), aid to public education (Head Start and others), protections for the environment, Medicaid to provide medical care for the poor and their children, and Medicare to aid the elderly. All of Johnson's progress was brought to a halt as the undeclared war heated up in the Vietnam. Many of the new programs were tested in the courts, as they are still being tested today.

From 1965 to 1967, Justice Thurgood Marshall served as Solicitor General under President Johnson. Representing the government before the Supreme Court he successfully argued the cases, such as the court voting to adopt the Miranda rule, which requires police to inform suspects of their rights. By the time President Johnson appointed Marshall in 1967 to the Supreme Court, Marshall had argued 32 cases before the Supreme Court, winning 29 of them. President Johnson said at the

time that appointing Marshall to the Supreme Court was "the right thing to do, the right time to do it, the right man and the right place" (Goodwin, 1991, p. 234).

Marshall's nomination to the Supreme Court in 1967, like his nomination to the Court of Appeals, was a difficult affair. Four senators on the Judiciary Committee, all Southerners, opposed him: Strom Thurmond of South Carolina, James Eastland of Mississippi, John McClellan of Arkansas, and Sam Ervin of North Carolina. An openly segregationist Thurmond asked Marshall 60 questions on constitutional history and the meaning of the Thirteenth, Fourteenth, and Fifteenth Amendments. Nevertheless, Marshall was confirmed by a vote of 69 to 11. By this time, Marshall was an experienced Supreme Court advocate, having presented many cases before the Justices, including challenges against White-only primary elections and restrictive covenants. He presented each of his cases in what would become his hallmark style: straightforward and plain-spoken. When asked for a definition of "equal" by Justice Frankfurter, Marshall replied, "Equal means getting the same thing, at the same time and in the same place" (Williams, 1998, p. 18).

Throughout his time on the court, Marshall remained a strong advocate of individual rights. His position did not change, but as his fellow justices came and went, Marshall found himself on the ideological left. He remained a conscience on the bench, never wavering in his devotion to ending discrimination. In the midst of the 1987 celebration of the bicentennial of the Constitution, Marshall declared the document "defective" for failing to deal with slavery or the rights of women. When the nine members of the Supreme Court were invited to a reenactment of the

Founding Fathers' deliberations, Marshall refused to go. Later he told an interviewer: "If you are going to do what you did 200 years ago, somebody is going to give me short pants and a tray so I can serve coffee" (Marshall, 1987). Marshall did not call his colleagues racist, but he was frustrated by what he saw as their lack of awareness of the effects of racism on American society and the nation's dismally racist history. "They need to stop looking for excuses not to enforce the Fourteenth Amendment as it was intended to be enforced," he said (Marshall, 1987).

Marshall is often remembered for his passionate dissents. Of these, one of his best known is a 63-page opinion in *San Antonio School District v. Rodriguez* (1973)). The court held, 5–4, that the Constitution's guarantee of equal protection was not violated by the property tax system used in Texas and most other states to finance public education. Marshall accused the majority of "unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens."

Thurgood Marshall, the architect of American race relations in the 20th century, laid the foundation for today's racial landscape; his grand design of how race relations best work makes his life's story essential to know for anyone delving into the powder-keg of America's greatest problem. His actions added to the foundation to pursue civil rights at many levels. Marshall developed a model for other activists to follow in civil rights litigation. To many, Marshall has been a *conscience*. In the law he remains our *supreme conscience*.

Twenty-two years ago, even before Marshall broke the 178-year color barrier on the Supreme Court, *Newsweek* magazine wrote: "In three decades he has probably done as much to transform the life of his people as any Negro alive today, including Nobel laureate Martin Luther King" (Williams, 1998, p. 99). The accolade was deserved. Marshall had built his reputation slowly, in backwater southern towns, overwhelmed but not overmatched by a twisted White justice wrought by judges and sheriffs who had few second thoughts about beating in Black heads, or his Black head. Yet, Thurgood was needed by everyone—Black and White—as he continued his relentless pursuit for social justice. He brought hope to his people because they knew the code: Thurgood is coming.

It was Thurgood Marshall who ended legal segregation in the United States. He won Supreme Court victories breaking the color line in housing, transportation, and voting, all of which overturned the "separate-but-equal apartheid of American life in the first half of the century.

It was Thurgood Marshall who won *Brown v. Board of Education*, ending the legal separation (theoretically) of Black and White children in public schools. The success of the *Brown* case did indeed spark the 1960s civil rights movement, leading to the increased number of Black high school and college graduates and the rise of the Black middle-class in both numbers and political power in the second half of the century.

It was Thurgood Marshall, as the nation's first African American Supreme Court justice, who promoted affirmative action—preferences, set-asides, and other

race-conscious policies—as the remedy for the damage remaining from the nation's history of slavery and racial bias. Justice Marshall gave a clear signal that although legal discrimination had ended, the devastation of segregation had not; there was more to be done to advance educational opportunity for all people who had been locked out and to bridge the wide canyon of economic inequity between Blacks and Whites. In Marshall's speeches he emphasized the need to continue the struggle for civil and individual rights that became the cornerstone of protections for all Americans, including women, children, prisoners, and the homeless: "Take it from me, we haven't won it yet. We've got a long way to go" (Marshall, 1978).

It was Thurgood Marshall, as the nation's first African-American Supreme Court Justice, who worked on behalf of Black Americans and built a structure of individual rights that became the cornerstone of protections for all Americans. He succeeded in creating new protections under the law for women, children, prisoners, and the homeless.

Justice Marshall (1978) delivered an address at Howard Law School, his alma mater that made national news because of Marshall's remarks regarding whether or not Black Americans had achieved equality. Unlike earlier speeches, where Marshall stressed hard work and diligence, there were undertones of resignation to this speech, and warning against the "traps" that are still being laid for Black Americans. He noted that the Constitution is not yet colorblind.

Marshall had an impact on Texas in particular as well. The resistance to *Brown* was similar to other resistance to federal constitutional rulings, such as *Ruiz v.*

Estelle, the topic of this dissertation. Before *Brown v. Board of Education I* in 1954 the situation in the Texas courts was that the Texas district court judges had refused to help Texas African Americans with matters of segregation and racism; they were unwilling to extend the court's functions to encompass protections of political rights and issues. Only after the Supreme Court had literally ordered the district court judges to change their views on the subject, did they do so, and even then they proved unwilling to extend this view to other civil rights issues. It was as if these judges just "dug in their heels" and refused to take cognizance of the Supreme Court orders to implement the landmark decision of *Brown*. The district judges did finally order desegregation of the schools to commence, but allowed community pressures and obstructions to slow the desegregation process for over a decade (in reality, this continues today).

In political, procedural, and administrative contexts, *Brown* is an important milestone for federal district courts, not only because it revolutionized the civil rights laws, but because it changed the course of civil rights litigation. In the wake of *Brown*, judges took up the task of managing the transition to desegregation. The judges stepped out of their traditional neutral stance to broker and supervise the settlements. These lawsuits aimed variously at ending unconstitutional racial distinctions in housing, employment, and voting rights, and also extended rights of criminal defendants, prison inmates, mental patients, and other disenfranchised groups. Federal judicial oversight of institutional reform emerged out of this process and became the dominant feature of civil rights lawsuits. *Brown* stands as a

monument to its constitutional significance and to the persistence in litigation, especially of those attorneys involved.

The resulting federal system of government assures a tension among national government, state governments, and organized interests over which level of government has authority to act and whether policy established at one level can contradict policy established at the other level. At numerous points in U.S. history, the cry of "states' rights" has been heard, while at other times, the public demands for the national government to assure uniform (equal) treatment of people across the nation. This boils down to the question of whether the federal government should be allowed to preempt state laws in areas protected by the Tenth Amendment.

Supreme Court Chief Justice John Marshall, Chief Justice Earl Warren, and Supreme Court Justice Thurgood Marshall fashioned a new jurisprudence of structural reform in the courts. The demands of *structural reform* have magnified the explicitly political dimensions of litigation.

Litigation as a Tool

The lawsuit has become a component of the continuous political bargaining process that determines the shape and content of public policy. Over time, and following the examples set by Marshall, Warren, and Marshall, federal judges have exhibited more willingness to issue expansive reform orders and oversee long compliance processes arises. Specific to inmates, federal judges have come to recognize that it is more important to the plaintiffs to achieve substantive change than

merely to have the constitutional violation recognized. The expansion of judicial participation has translated over time into the *implementation of public policy* by designing and managing major changes in institutions. Since the 1960s plaintiffs increasingly have asked courts to correct violations of law and to effect systemic reform of entire institutions and/or programs where states have failed to do so. While involved with the prison reform lawsuit *Newman v. Alabama* Judge Frank M. Johnson wrote:

> Judges are not wardens, but we must act as wardens to the limited extent that unconstitutional prison conditions force us to intervene when those responsible for the conditions have failed to act. (*Harris v. Flemming*, 1988)

Sweeping decisions in case after case involving prisons forced states to spend large sums of money to provide the minimum constitutional requirements within the prisons. The federal decisions also forced prison administrators to extend due process, justify doubtful decisions, limit discretion, and be answerable to the public. Prisons previously insulated from rigorous scrutiny by remote locations, lack of public concern over inadequacies, and careful prison administrative control over public access were now confronted with regular evaluation by lawyers and the courts.

While such judicial decisions and interventions had many champions and supporters, it also generated considerable criticism. Some critics objected to judicial efforts to reform institutions on grounds that federal courts lacked constitutional and political authority to play such a role, and others asserted that federal judges had usurped the authority belonging to state legislators and executive branch officials.

The judges made clear that their rulings were backed by "the authority to direct change from the Constitution" (Thomas, Keeler, & Harris, 1986).

From values traditionally found in the Constitution, particularly in the due process and the cruel and unusual punishment clauses, the Supreme Court and the federal courts of appeals have extracted broad principles: basic, fundamental rights to medical, psychological, and, humane treatment while confined to a custodial institution (*Bowring v. Godwin*, 1977; *Estelle v. Gamble*, 1976; *Newman v. Alabama*, 1974). Consequently, judges prescribed changes in institutional policy to preserve constitutional rights of prisoners. Increasingly, judges accepted the role of "administer" to oversee changes in these complex bureaucratic institutions. Courts established a regime of supervision capable of penetrating the dense fog of bureaucratic structure, resolving conflicts, and forcing compliance within the confines of the decrees. Over the years the courts have issued far-reaching decrees encompassing conditions and practices shaped by every aspect of institutional life. However, federal courts may require no more than the *minimum set by law regarding "totality of conditions."*

Opponents to increased judicial involvement in social policy reform primarily have expostulated that the judges' departure from the generally accepted norm of judicial noninvolvement in political affairs is offensive and a violation of the separation of powers doctrine. Furthermore, arguments against judicial intervention note that such cases place an unsatisfactory administrative burden on the federal courts (J. Johnson, 1976). Yet, as history has shown, litigation was the only effective

means to resolve broad social issues at that time. Judge Frank Johnson of Alabama (1981) noted,

> The recent involvement of the courts in heretofore exclusively executive and legislative functions may well be a novel form of judicial activity….the new form of judicial activism is attributable to a significant change in the nature of a number of cases and controversies that the judiciary has been called upon to resolve. (p. 273)

Under the umbrella of federalism, judges and advocates have witnessed an increased reliance on law as an instrument of social control and change, where rights are defined and wrongs corrected. A major change resulting from prison litigation was the transformation of the Southern prisons away from the *Southern plantation model* of operation. Conflicts involving issues of federalism established the foundation for the intervention of federal judges into the affairs of the state of Texas.

Throughout U.S. history, Americans have launched a variety of reform movements aimed at achieving social justice and bringing the conditions of daily life into conformity with democratic ideals. *Brown* did not bring an immediate end to segregation, but it marked the start of an uneasy transition in education reform across the country. *Brown* also laid the bedrock for the modern civil rights movement and ultimately forever changed race relations in America. Civil rights groups now have a strategy and a model for other issues. Some reformers preferred to work to change institutions, such as prisons.

Brown (1954) was the bedrock of more successful rulings: The Civil Rights Act of 1964, The Voting Rights Act of 1965, and the Housing Act of 1965. Advocates for prison reform were able to put all of these court accomplishments and

learned knowledge into their tool box needed to address prison reform. Prison litigation has become an ongoing struggle as well as *Brown.*

Historical Overview of U.S. Prison Philosophy

The history of custodial institutions reveals an enduring tension between punitive and rehabilitative objectives, reflecting conflicting social attitudes towards dependent or socially deviant individuals and their guaranteed fundamental rights as stated in the U.S. Constitution.

The modern prison is of recent origin, taking root after the American Revolution. Throughout this era the most common form of punishment was a combination of banishment and various forms of public punishments, such as the stocks, the pillory, branding, whippings, mutilation of limbs, ball and chain, yoke, hanging, and burning. Durkheim (1918/1968), Foucault (1977), and Goffman (1961) delved into the ideas of punishment and expressed their belief that crime was a product of the environment and individuals were not born criminals. Almshouses and workhouses evolved into penitentiaries. Prisoners were sentenced to perform hard labor in the city streets in front of the general public. Some of the public called for changes or at least solitary confinement. Humanitarian impulses contributed to the Enlightenment period.

The Enlightenment

During the Enlightenment period reformers were rethinking the nature of society and the place of the individual. Concepts of liberalism, rationalism, equality, and individualism dominated social and political thinking. These reformers challenged ideas about the nature of criminal justice and old ways of punishment. The French philosopher Michel Foucault (1977) has written about the spread of the Enlightenment ideas during the late 18th century. Foucault noted a shift in policy from physical (corporal) punishment such as torture and hangings to a punishment that would not inflict pain but attempted to change (reform) the individual and set him or her on the "right path." This belief held that reformed behavior was possible because the criminal's *environment* caused the criminal behavior. Thus, it followed that an institutional environment rich in reflective instruction would end the life of crime.

Reviewing the copious literature about penitentiaries in early America reveals that penitentiaries were designed to be places where convicted felons not only could be removed from the rest of society, but also could be kept separate from the rest of the prison population. In these institutional settings it was assumed that prisoners were isolated from society and one another (to avoid negative influences), forcing them to reflect on their past misdeeds, leading them to repent and, theoretically, reform (Foucault, 1977). The emphasis was on giving the criminal the opportunity for penitence—hence the name *penitentiary*.

The Progressive Movement

During the time of the Progressive Movement epoch (1890–1920) the American idea of criminal punishment continued to shift from corporal punishment to reforming the criminal. During this era it was believed that criminal conduct was an antisocial aberration that could be corrected. Unlike their predecessors, the Progressives did not see humans as naturally depraved human beings, easily corrupted by evil influences, whose good conduct could be guaranteed only by the fear of harsh, swift corporal punishment. Criminal behavior, in the view of the Progressives, arose out of the combined pressures of poverty and ignorance, coupled with the absence of any sense of civility or moral restraint—in other words, the environment. It naturally followed with this line of thought that to correct criminal behavior society had only to remove the offenders from the surroundings and circumstances that had led them to crime. Society also must provide the training and moral discipline that would make the prisoner a good citizen (specifics varied regarding training and moral discipline). The penitentiary became the institution or the instrument that society established to reform the criminal offender.

Historical Overview of U.S. Prison Development and Practice

The Walnut Street Jail became the first state prison in America, and it was part of a much larger goal to create a powerful, centralized, and formal state institution. Prior to the building of the Walnut Street Jail, most punishment was dealt with on the local level. The Quaker colony of Pennsylvania opened the Walnut Street

Prison to rehabilitate criminals, which seemed to the Quakers better than punishment that the prisoners received on the streets. At the Walnut Street Jail, prisoners convicted of crimes were locked up, removed from society, and subjected to hard labor and regular discipline.

The debate over how best to achieve the goals of penitentiary incarceration gave rise to two schools of thought, one centered in Pennsylvania, the other in New York. Both stressed the moral component of reformation and, to a greater or lesser degree, sought to keep inmates isolated from each other. Most importantly, both theories emphasized that inmates were to be kept busy at productive labor, the performance of which would instill in them habits of punctuality, sacrifice, and discipline. The major difference between the two systems involved the degree to which prisoners were to be kept apart from each other and the *profit* to be made, a question that ultimately determined the design of the prison and the kind of work performed by the inmates. The first penitentiaries in Pennsylvania and New York operated with a focus on reform, unlike the first "Work Houses" established by a 1776 Philadelphia law.

Pennsylvania Plan

In 1787 a Quaker group, the Philadelphia Society for Alleviating the Miseries of Public Prisons, constructed the Pennsylvania system of penitentiary management. Under the Pennsylvania Plan two prisons were constructed during the early 19th

century. The Western Penitentiary was opened in 1826. The Eastern Penitentiary was opened in 1829, in a location known as Cherry Hill.

The Eastern and Western Penitentiaries were similar. At Cherry Hill prison inmates were kept in isolation in their cells 24 hours a day in "quietude" to impose moral discipline (Rothman, 1971). The only human voice heard was that of a clergyman on Sundays. Prisoners could only speak with prison officials or with ministers who provided Bibles and other religious literature upon request. The Pennsylvania system isolated prisoners for the entire period of confinement as a method to force them to contemplate their crimes, repent, and reform. Prisoners spent their days digging ditches and building roads. The goal was to rehabilitate, not to impose brutality. Inmates could not make contact with other prisoners because they might exert a negative influence. All inmates had their own private cell, with adjoining private exercise yard, and remained within these confines for the entire period of incarceration.

Nothing was permitted to distract the prisoner from penitence and the path to reform. The duty of the penitentiary was to separate the offender from all contact with corruption, both within and without. The isolation provided protection against possible "moral contamination" through evil association.

The use of solitary confinement placed more emphasis on punishment than on rehabilitation. Later, prison authorities expanded the use of the cell as a means to control inmates. "Administrative segregation" continues to be the label for the private cells (Foucault, 1977). The Pennsylvania plan soon came into disrepute because so

many prisoners died—many by suicide—or became insane. These systems also began to fail as they quickly became overcrowded. By 1913, Cherry Hill shut its doors (Teeters & Shearer, 1957).

New York Penitentiaries

New York State opened the Auburn prison, built to house both state and federal prisoners. Under the Auburn plan in New York, Newgate Prison opened in1797 and in 1821 a second prison was built in Auburn.

In Auburn, prisoners worked during the day in groups in large workshops where they used steam-powered manufacturing equipment to produce a variety of goods. Early prison factories resembled factories on the outside, and for a time prisoners produced goods that were sold in the free market. The use of machinery afforded greater levels of production, more uniform quality of finished products, and higher earnings for the prison—results guaranteed to please even the most cost-conscious legislators and prison administrators. The idea was for inmate labor to produce goods for sale, ostensibly to cover operating costs. While the prisoners were out of their cells and working together, they were forced to abide by strict rules of silence. At night, they retired to private cells where the "reign of silence" continued and self-meditation was required (Rothman, 1971). In the Auburn prison, men lived under tight control and worked to pay a portion of their keep.

Prison administrators at Auburn called their system "humanitarian," but the system they created was almost as repressive as methods used in previous years. It

did not take long before harsh discipline became an essential tool to force prisoners to adapt to the rigors of prison life (D. Walker, 1988). The goal was "cheerful" submission to authority (p. 10). However, neither the "lock-step" nor the "cat-o-nine-tales" were humanitarian or cheerful. In the "lock-step" prisoners marched single file, shuffling their feet and keeping their eyes to the right; both the lock-step and the use of the cat-o-nine-tales were developed at Auburn.

The universal conviction among leading prison reformers that hard work and discipline brought about the reform of criminal behavior led almost inevitably to the working of prison inmates for a profit. The Auburn system fit nicely within the larger structure of capitalism, characterized as it was by the need for cheap labor. For many reasons, prison officials leaned towards the prison model offered by New York at its Auburn penitentiary.

Administrators and legislators quickly realized that they could hire out the labor of prisoners while theoretically helping to reform these individuals. The proceeds from the inmate labor eased the financial burdens of taxpayers dissatisfied with the thought of having to support prisoners. The desirability of working prisoners at some form of *profitable* employment became the hallmark of 19th-century prison management in the United States.

The "contract system" was used at the Auburn penitentiary. Under this arrangement, prison officials, at the instruction of their state legislators, advertised for bids from private contractors who wished to work the prison inmates within the walls of the prison. The state, for its part, received a fixed price per prisoner per day for the

labor. The popularity of the contract system derived chiefly from its profitability. However, prison reformers contended that moral reformation of the prisoners was impossible as long as the state viewed its prison population as simply a source of revenue. Reformers deemed this exploitation of prisoners by private interest (S. Walker, 1999, p. 71).

Beaumont and Tocqueville

Over the years, inadequate prison living conditions continued to be addressed by a small group of concerned advocates. Gustave de Beaumont and Alexis de Tocqueville arrived in the United States in 1831 to observe prisons firsthand and to report back to Europe on the penitentiary system. When these two travelers arrived in America, people were proud, optimistic, and excited about the possibilities of social reforms. How to manage criminal offenders was a question of the utmost importance. The men learned quickly about the two different plans. The states of New York and Pennsylvania offered somewhat opposing policies and programs for prisoner incarceration to manage criminal offenders. The differences between the two plans had to do with (a) the goals of penitentiary incarceration and (b) the profit that could be realized from both plans.

Beaumont and Tocqueville (1833/1976) were surprised at the willingness of American society to incarcerate its least favored citizens in "despotic" places of solitary confinement. Tocqueville (1848/1969) understood that complete isolation

from others "produces a deeper effect on the soul of the convict," an effect he worried might prove "disabling" when the convict was released into free society.

> This experiment [isolation], from which so happy a result had been anticipated, was fatal to the greater part of the convicts; in order to reform them, they had been submitted to complete isolation; but this absolute solitude, if nothing interrupts it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills. (as cited in Marquart & Sorensen, 1997, p. 50)

Beaumont and Tocqueville (1833/1976) also toured prisons that had not attempted to make changes:

> In these later, the ancient system prevails in its whole force; the crowding of prisoners, confusion of crimes, ages, and sometimes sexes, mixture of indicted and convicted prisoners, of criminals and debtors, guilty persons and witnesses; considerable mortality; frequent escapes; absence of all discipline; no silence which leads the criminals to reflection; no labour which accustoms them to an honest mode of subsistence; insalubrity of the place which destroys health; ignism that depraves; the assemblage, in one word, of all vices and all immoralities-such is the picture offered by the prisons which have not yet entered into the way of reform. (as cited in Marquart & Sorensen, 1997, p. 53)

Further,

> We shall not speak of the *Southern states,* where slavery still exists; in every place where one half of the community is cruelly oppressed by the other, we must expect to find in the law of the oppressor, a weapon always ready to strike nature which revolts on humanity that complains. Punishment of death and stripes—these form the whole penal code for the slaves. But if we throw a glance at those states even which have abolished slavery, we shall see this civilization uniting itself in some with penal laws full of the rigour of a code of Draco. (as cited in Marquart & Sorensen, 1997, p. 54)

Beaumont and Tocqueville returned to Europe with the impression that improvements were in the making.

Americans did not seem to concern themselves with whether the New York or Pennsylvania management plans were better; rather, their concern was about

maintaining “social order” and control of the “dangerous classes” (Rothman, 1971, p. 164). Rothman suggested that the public was convinced that the poor would “corrupt society” and “criminals would roam out of control” (p. 27).

The Lease System

The poor and minorities had been at the mercy of slavery, the contract system, and now the lease system. States interested solely in the money they could make from prison labor generally chose the lease system because it seemed like the most profitable form of penitentiary management. Although leasing reached the peak of its popularity in the post–Civil War South, the system began many years earlier in other parts of the nation. Not until the Reconstruction South embraced the system, however, did it become entrenched (Zimmerman, 1947, as cited in Barnes, 1972, p. 22). The leasing system harkened back to frontier vigilantism and southern lynching. Its roots reached back to the social and racial relations of the antebellum South. The terms of the lease contract usually called for the state to yield control of its prisons, along with all equipment, buildings, other property, and inmates, to the highest competitive bidder. Lessees could employ prisoners in any way they chose, even subcontract them to other individuals, subject only to very minimal state regulation and control. In return for the lease of the prison, the lessee paid the state a specified amount of money at regular intervals. In adopting the lease system, the state abdicated virtually all responsibility for the welfare of its prisoners. As a result, the typical leased institution lodged prisoners who were poorly fed, poorly clothed,

poorly housed, without proper medical care, and worked beyond reasonable limits. Unless state officials were particularly diligent in ensuring proper prisoner care, lessees did as they chose, and most had personal profit uppermost in mind. Most states did not exercise such diligence, and the lease system came to be characterized by unconscionable levels of brutality, tyrannical cruelty, and neglect (McKelvey, 1936, p. 181). This led to the exploitation of prison inmates by private interests. The debate over prison labor, including assessments of the relative advantages and disadvantages of each system, consumed a great deal of the time and effort of early penitentiary administrators. As individual states began taking steps to establish their own prisons, they studied closely the experiences of others and selected the type of management and labor system best suited to their needs.

The Reformatory Period, 1970–1900

Another period of prison reform was the Reformatory Period, 1870–1900. An example is The Elmira Reformatory in New York. The building still stands today. The administration attempted rehabilitation based on the medical model, through offering a wide variety of programs. The Elmira Reformatory, and other reformatories, failed to live up to the promise of reforming criminals and failed to provide the right sort of psychological surroundings to expedite the process. It became just another overcrowded prison (Marquart & Sorensen, 1997).

The Big House, 1900–1946

The next period is called "the Big House," 1900–1946. Rothman (1971) concluded that the way prisoners really analyze prisons is by observing the physical presence of their surroundings, such as the heavy iron gates and the massive walls built around the prisons (Wolfgang, Savitz, & Johnson, 1962). These walls helped wardens and guards keep their jobs. Legislators and the general public seemed to be content with the false sense that the high walls guaranteed that criminals were safely behind bars so they could not prey on the innocent citizens. Marquardt and Sorensen (1997) wrote, "The Big House did not reform prisoners" (p. 162). Prisoners learned to blunt their feelings, turn inward, and construct fantasy worlds for themselves, much the same as prisoners do to survive in today's prisons. Prison life "embittered many. It stupefied many" (p. 162).

The Correctional Institution, 1946–1980

During the time of the "Correctional Institution," 1946–1980, a new system of prisoner classification was developed to group prisoners in the appropriate facilities. Many have called this era the rehabilitative ideal as treatment was emphasized. However, a lot of the reorganization was just changing the names of things. The "hole" (solitary confinement) was now called the "adjustment center." The new term for prisons was "correctional institutions." The goal of the classification system, combined with adequate diagnosis, *could* lead to a correct treatment plan based on the medical model of treatment. In reality, nothing really changed. Rothman (1971)

commented that prisons in the post–World War II era continued pretty much they way they were before. However, the relatively new rehabilitative philosophy and its actualizations promoted social order. People believed that this philosophy affirmed that people were sick and started searching for cures. Many adopted Freudian interpretations. The idea was that a variety of effective treatment strategies would complete the ideal correctional institution. But none were discovered.

Currie (1998) commented,

> The public and most government policy makers continue to demand that prisons first accomplish their assigned tasks: punishment, restraint of prisoners. In addition…institutions have long traditions, administrative hierarchies, divisions, informal social worlds, and special subcultures among the old staff. There has not been a case where it was possible to rid the prison systems of the old regime, though often they tried; and the old timers, many of whom were antagonistic to new routines, resisted change, struggling to maintain as much control as possible….Prisons, correctional institutions, were never totally, or even mainly, organized to rehabilitate prisoners. (p. 164)

To explore Texas prisons, the history of prison development must be considered along with the history of the court system and states' rights versus federalism. In this context civil and individual rights of Americans are considered.

Prison Litigation: Federalism Versus States' Rights

Federal interventions into state correctional affairs renewed the debates between federalism and states' rights. Federalism, as mentioned earlier, is based on the doctrine of the separation of powers among the executive, legislative, and judicial branches of government. The opponents of judicial mandates insist that judicial intervention into the political process conflicts sharply with values inherent in

federalism and separation of powers (Austin, 1988). Implicit in this doctrine is the notion that matters of state and local policy should be left to legislatures and administrative officials, deemed better informed and better able than federal judges to adopt and administer social policy laws. Federalism, to this way of thinking, threatens to undermine state sovereignty. Alexander Hamilton (1788/1990) in *The Federalist Papers* discussed how the preference to settle disputes is found in the Constitution:

> It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the later within limits assigned to their authority. The interpretation of the laws is the proper and peculiar providence of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any peculiar act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or in other words, the Constitution ought to be preferred to the statue, the intention of the people to the intention of their agents. (as cited in Robbins**,** 1990, p. 176)

Alexander Hamilton (1788/1990) continued,

> The independence of the judges is equally requisite to guard the Constitution and the rights of the individuals from the effects of those ill humors which are the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. (p. 185)

Judicial intervention and administration of equitable relief for constitutional violations in prison cases were once considered to be outside the realm of judicial control. Formerly reluctant to issue "unenforceable" decrees, since the 1960s federal courts have been more willing to participate in large-scale correctional reform. Courts

normally define procedural criminal law through judicial rulings (Robbins, 1990). Prison litigation has employed several amendments to the Constitution as the foundation to bring about change. For redress of grievances, federal courts have applied the First Amendment, protecting freedom of speech, religion, assembly, and the right to petition the government. Additionally, the Fourth Amendment, protecting a person's right to be secure in his/her person, house, papers, and barring unreasonable searches and seizures, has been cited. The Fifth Amendment outlines basic due process rights in criminal cases, including protection against self-incrimination, meaning that defendants cannot be forced to respond to questions whose answers may reveal that they have committed a crime. This amendment contains the initial constitutional statement on "due process of law." The Sixth Amendment provides the right to a fair and speedy trial by an impartial jury of one's peers and the defendant's right to counsel. The Eighth Amendment prohibits excessive bail, excessive fines, and cruel and unusual punishment.

Chief Justice Earl Warren (1964) declared that judges must use the "values of contemporary society" to determine whether a specific punishment is cruel and unusual. More recently, the courts have relied on the Eighth Amendment's prohibition against cruel and unusual punishment to address such issues as overcrowding, medical issues, and food services. The courts, to defend powerless groups and force public institutions to adhere to constitutional obligations, have used these amendments, designed to protect individuals' rights against infringement by state and local governmental officials, to protect minorities from the majorities. The

Fourteenth Amendment bars states from violating the right to due process of law. Although the ambiguity of this amendment required judges to determine how these rights would be applied, due process implies that procedures meet a basic standard of "fundamental fairness." For example, in 1932 in *Powell v. Alabama*, the Supreme Court ruled that the due process clause required courts to provide attorneys for indigent defendants facing the death penalty. The Fourteenth Amendment was used in the *Brown* litigation in 1954. When these amendments were first used regarding prisoners' rights they were applied to issues such as religious observances and access to communication with legal representatives. Overall, courts are relying on the Constitution for guidance in deciding cases of states' rights versus national justice.

Prisoner Rights Litigation

Pre-1960s Litigation

From 1871 to well into the 1960s, the federal judiciary adhered to a "hands-off" attitude towards prisoners. The judiciary refused to intervene in prisoners' complaints out of their concern for federalism and separation of powers and a fear that judicial review of administrative decisions would undermine prison security and discipline. Prisoners, therefore, were isolated from the rest of society, literally "behind the walls." The possibility of forming alliances with groups outside prison was very limited. The precondition for the emergence of a prisoners' rights

movement in the United States was the recognition by the federal courts that prisoners are persons with cognizable constitutional rights.

A few prisoners' rights cases were handled by the courts prior to the 1960s. However, most case filings were ignored. Case law from this period shows that authority of the prison administration to select a mode of inflicting discipline was "reviewable." Therefore, there were cases where relief was held obtainable against an officer in charge of the inmates. Custodians were held liable for damages in *Topeka v. Boutwell* (1894). In this case the prisoner claimed that he was beaten with gross excess after having been subdued and placed under custodial control. The Kansas Supreme Court stated that it is the duty of the custodians to treat prisoners "humanely….Keepers of city prisoners have no warrant authority in law to be harsh and brutal in management of those in their custody" (p. 822). In *Peters v. White* (1899) the superintendent of a workhouse was held liable for the illegal and unauthorized infliction of corporal punishment on a prisoner. In a sprinkling of cases state and federal constitutional prohibitions on cruel and unusual punishment were invoked successfully where the imposition of discipline was litigated. In 1899, the federal district court in Georgia in the case of *Birdsong, In re, 39 F. 599* (1889) found that chaining a prisoner by the neck to the grating of his cell to force him to stand through the night was cruel and unusual punishment**.**

Monroe v. Pape

There was a long dry spell for prisoner rights litigation until the early 1960s when the filing of prisoner rights litigation became more frequent. Prisoner civil rights litigation was stimulated by *Monroe v. Pape* (1961), which resurrected the use of the post–Civil War civil rights legislation. This decision provided the fundamental theory for most subsequent prisoner civil rights litigation. As a result of the *Monroe* ruling, the courts, corrections, and the Constitution were obliged to work together.

Cooper v. Pate

Another important decision was the ruling of the Supreme Court under Chief Justice Earl Warren in 1964 in the Illinois case *Cooper v. Pate* (1964), which set the precedent for judicial prison reform. The *Cooper* decision was significant for two reasons. First, it allowed state prisoners explicit and direct avenues to federal courts and to bring suit against their keepers under Title 42, Section 1983, of the Civil Rights Act of 1871. Second, in recognizing Black Muslims as a legitimate religion, the court explicitly provided prisoners with expanded religious freedoms and implicitly extended Bill of Rights protections to inmates under the First Amendment.

Johnson v. Avery

The decision, *Johnson v. Avery* (1969) protected prisoner access to the law by forbidding prison officials from interfering with "jailhouse lawyers" working on behalf of other inmates. The use of the jailhouse lawyers, also called "writ writers,"

provided unskilled or illiterate inmates with the means to petition courts. These decisions and others began to establish the courts as a protector of prisoners' rights. The Fifth and Fourteenth Amendments provided due process protections.

Holt v. Sarver

In *Holt v. Sarver* (1971) the prison system in Arkansas was found to be unconstitutional due to "intolerable and inhuman living conditions." In *Holt v. Sarver*, inmates in the Arkansas state penitentiary system charged that their constitutional rights were violated when they were forced to perform uncompensated farm labor. They also contended that the "totality of conditions" of confinement amounted to "cruel and unusual punishment" proscribed by the Eighth Amendment. Further, they charged that unconstitutional racial segregation, prohibited by the Fourteenth Amendment, was practiced within the Arkansas state penitentiary (J. Johnson, 1976). Johnson noted that the *Holt* case was "the first time that convicts had attacked an entire penitentiary system in any court, either state or federal" (p. 1163).

Since the *Holt* precedent, judicial action in prison reform has increased. These court determinations gave credence to lawsuits charging prison officials with violating inmates' civil rights. As provided in the Eighth Amendment, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." District Judge Henley in the *Holt* case, in granting relief to the inmates, set the tone for future corrections reform. The trial involved a great deal of discussion regarding the intervention of a federal judge into the affairs of the state. Henley

responded by admonishing Arkansas officials and reminding them that the final word in these matters belonged to the court as defender of the Constitution. Henley wrote, "If Arkansas is going to operate a penitentiary system, it is going to have to be a system that is countenanced by the Constitution of the United States" (as cited in J. Johnson, 1976, p. 1167). Before the *Cooper* (1964) and *Holt* (1970) cases, courts commonly declined to hear inmate lawsuits. After these decisions, felons no longer were considered "wards of the state" and were entitled to full constitutional protection of personal rights, except those lost by reason of confinement.

Newman v. Alabama

Newman v. Alabama (1972–1975) decided that the Alabama correctional system violated inmates' rights under the Eighth and Fourteenth Amendments by not providing "adequate" and "sufficient" inmate medical care. The court ordered that deficiencies be remedied "independent of cost." In other words, the cost of providing adequate medical care to inmates is not an acceptable excuse for failing to provide it. In 1971, an Alabama inmate filed the lawsuit, charging that six inmates had died in the state prison hospital because of improper treatment. In 1976, Judge Frank M. Johnson, Jr., assumed control of the entire Alabama prison system following numerous attempts to force the state to make the necessary changes to be in compliance with the Constitution. Alabama was the first state to be placed under a comprehensive court order mandating changes in its penal system (Cooper, 1988).

Guthrie v. MacDougall

The lawsuits of *Guthrie v. MacDougall, Guthrie v. Caldwell, Guthrie v. Ault, and Guthrie v. Evans* began in 1972, ending in 1986. Over 50 Black inmates of the Georgia State Prison filed a complaint with the federal court. The *Guthrie* litigation, although never proceeding to trial, resulted in sweeping changes in the Georgia State Prison at Reidsville. In this class action lawsuit, the Judge condemned as cruel and unusual punishment the segregation, overcrowding, poor medical care, and unfair treatment of inmates (Thomas et al., 1986). This lawsuit was unique because it did not go to trial. The judge achieved the needed changes through use of remedial decrees.

Morales v. Turman

In *Morales v. Turman* (1974), a federal judge in Texas held unconstitutional the detention of juveniles in certain facilities maintained by the Texas Youth Council. The judge cited extreme brutality and indifference experienced in the institutions.

Wolff v. McDonnell

In 1974, the Supreme Court issued its landmark disciplinary decision, *Wolff v. McDonnell,* which extended the prison lawyer's authority of representation for civil rights suits attacking institutional conditions and policies. The Supreme Court provided a clarion statement that could serve as a rallying call for prisoners' rights:

> But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. (*Wolff v. McDonnell*)

Additionally, *Wolff* set forth due process rights available to inmates involved in disciplinary hearings that might result in "grievous loss" (e.g., forfeiture of good time) (Ross, 1975). *Wolff* also pertains to prison discipline and serious misconduct, according to Ross.

Pugh v. Locke

Judge Frank Johnson's order in *Pugh v. Locke* (1976) to eliminate "jungle conditions" in Alabama prisons is considered to be another landmark decision in prison reform. Johnson ruled that the inhumane conditions were so extensive throughout the state's prison system as to constitute violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

James v. Wallace

In *James v. Wallace* (1976), Judge Johnson alleged that the state of Alabama had abdicated its role and responsibilities in carrying out an essential governmental function. He ruled that the state had failed to meet minimum constitutional standards in the state penal system, thus violating the Eighth Amendment and Fourteenth Amendment.

Estelle v. Gamble

In *Estelle v. Gamble* (1976), the U.S. Supreme Court issued a specific ruling on all inmates' constitutional rights to medical care. The Court ruled that there existed in Texas prisons a "deliberate indifference" by prison officials and/or personnel (physicians, corrections officers, and others) towards the serious medical needs of inmates. The Court decided that such indifference constitutes cruel and unusual punishment and thus is a violation of the Eighth Amendment. The court delineated that a prisoner does not lose the constitutional rights protected by the due process clause of the Fifth and Fourteenth Amendments and by the Eighth Amendment, which bans cruel and unusual punishment.

Texas Prison History

"Texas is a state of mind. Texas is an obsession. Above all, Texas is a nation in every sense of the word." – John Steinbeck in *Travels with Charley*

Tejas means "friendship. "Gone to Texas"—abbreviated GTT and written on the doors of abandoned homesteads across the southeastern United States during the 1830s and 1840s—is a key to the story of Texas. The scope of Texas history is broader than that of most other states, with its flavor of adventure and lessons of endurance, patriotism, and valor. In this paper it is necessary to condense much of the story. Homesteaders looking for a new beginning moved to Texas to build free communities and establish a new nation in the frontier. Even stories of rough and rowdy men and Native American renegades did not keep them from coming. This

new challenging frontier today includes 265,896 square miles, bordering three states and one international boundary. An underlying theme here is that a place without information about its past is like an individual without a memory—it has no identity. How can a people know what they are now if they do not know what they have been?

The first slaves in Texas were Indians captured along the Rio Grande region to work in the mines in northern Mexico in 1580. In 1729 the missionaries wrote about the condition of the Texas missions: "To insure their continue enjoyment of the comforts of civilization, the Indians were carefully locked in their houses each night, and a guard was posted on the wall" ((Newton & Gambrell, 1935, p. 41).

During the 1820s-1830s, Southerners became increasingly fearful of federal encroachment on what they considered the rights of the states. Texans believed that the U.S. government threatened their states' rights. States' rights are largely an abstract constitutional principle of people who believe that an opposing majority in control of the national government threatens their interests. Behind this concern was a strengthened commitment to the preservation of slavery and a resulting anxiety about possible uses of federal power to strike at the "peculiar institution."

Texas has drafted several constitutions since declaring independence from Mexico in 1836 (see Table 2). After Texas gained its independence from Mexico, it became an independent republic. The next Constitution was when Texas joined the United States as the 28th state. Texas seceded from the union in 1861 to join the Confederacy, which required a Constitution. To reenter the union after the Civil War required two constitutions. Finally, after Reconstruction, Texas adopted its current

constitution of 1876. Each constitution has been written to deal with changing political conditions in Texas. Slavery may have been the main influence on the writers of the Constitutions. Slavery in Texas was a *total system* of social, economic, political, and sexual exploitation based on force, violence, and an ideology of racism.

Table 2

The Texas Constitutions

Constitution	Date
Texas independence from Mexico	1836
Republic of Texas	1836–1846
Annexed to the Union	1845
Seceded from the Union	1861
Civil War	1861–1865
Reconstruction	1865–1876
Texas rejoins the Union	1869

Article 1 of the Texas Constitution contains the Texas Bill of Rights. Many of its provisions are similar to the U.S. Constitution's Bill of Rights. Because of the framers' experience during Governor Davis' administration, the Texas Bill of Rights contains provisions that state that the "writ of habeas corpus is a writ of right, and shall never be suspended."

The 1876 Texas Constitution clearly provides that cruel or unusual punishment should not be inflicted by the state, but this again was totally ignored by those persons charged with the management and discipline of the prisoners. The

Texas Constitution (2002) states, "Section 13: Excessive Bail or Fines: Cruel and Unusual Punishment: Remedy by due Course of Law. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted" (p. 4).

Meanwhile, the members of the Texas Prison Board of Directors could not resist involvement with politics and profit. The nature of the political, legal, and economic framework and the historiography of the working of the prison inmates for a profit began with the exploitation of prison inmates. Another factor that came into play was the political partisanship. Superintendent Thomas Goree stated, "No one will attempt to deny that the system is evil. It can only be defended on two grounds: necessity and because it is a source of income" (cited in D. Walker, 1988, p. 67). Goree noted that the feelings in Texas at that time were the most difficult of a solution of any" (D. Walker, p. 90). The idea was ingrained that the prisoners should serve as a source of revenue to the state. The *Sulphur Springs Gazette* wrote in 1909, "It really looks as if the State is more intent on making a profit out of its convicts than reforming them" (cited in *Dallas Morning News*, 1909, p. 8). The Rusk *Press-Journal* criticized the state officials who permitted abuses in the camps "in order that a few men in Texas may grow rich on the blood of these unfortunate men" (*Dallas Morning News*, 1909, p. 6). Various writings of the time indicated that the desire for profits formed the major consideration in determining the type of work the individual prisoners would do.

When Texas legislators turned their attention toward providing for a state prison system in the mid-1800s, they did so at a time when prison concerns were a major topic of discussion on the national level. Texas was at an advantage in that it was able to start from the experience of others and modify proven policies to fit the Texas setting.

As early as 1829 when Texas was part of Mexico, public officials governing the Mexican state of Coahuila and Texas directed their attention toward establishing an organized state penal system to ease the burden of local jails. In that year the state Congress empowered the governor to enter into a contract with private individuals to build two prisons, one in the district of Bexar, the other in the district of Parras. The agreement between the state and the contractors stated that the contractors would be permitted to use inmate labor to construct the prisons. Upon completion, the contractors would be entitled to receive all profits from the inmates' labor for 2 years. They would then share the profits equally with the state for an additional 3 years. At the end of 5 years, the prisons would become the exclusive property of the state (Gammel, 1898, as cited in D. Walker, 1988). The two prisons were never built. With the demise of the 1829 agreement, punishment of convicts again became the function of the local officials.

The idea that prisoners should work to redeem themselves and defray at least part of the costs of their incarceration has been characteristic of penology in Texas since the commencement of organized government in the state. The history of the Texas prison system is a study of the events that molded the policies of the times,

especially of the prison system, which from the very beginning was grounded in economic self-sufficiency. The plan of legislators and other public officials was to keep prisoners busy performing for the state some type of useful and moneymaking labor. Although the various plans and programs of prison labor did not always attain the desired results, state officials nonetheless maintained their belief that supervised work formed a vital part of prison rehabilitation efforts. Governors and legislators were most interested in making the penitentiary a place of profit.

Texas as Part of Mexico

Stephen F. Austin wrote about the new settlers and their spirit: "The early Texans like Austin, Burnet, Johnson, Crockett, Boone, Barrett, and Houston, and pioneers elsewhere, were impulsive, individualistic, and impatient of restraint" (Newton & Gambrell, 1935, p. 111).

Texans had inherited the traditions, temper, and political principles of a people naturally tenacious of their own laws and institutions and jealous and protective of their civil liberties. Texans believed in order and local self-government, which thrives (Newton & Gambrell, 1935).

. It is difficult to convey to outsiders the understanding and feelings surrounding the extremely hazardous life the settlers led in frontier Texas. In Texas in 2004 there are still counties that are classified by the U.S. Government as "Frontier" that few Texans or tourists visit today. The members of the first colony are still known as the "Old Three Hundred," and their descendents have always felt a certain

degree of superiority over the "newcomers" who came later. Families who are direct descendants of the Old Three Hundred are extremely proud of their ancestry.

Texas remained part of the Mexican Republic and was part of the larger state, Coahuila and Texas. Texas did not involve itself with the Mexican Revolution of 1810–1821, mainly because it was so far away. The new constitution of the Mexican Government in 1827, the Imperial Colonization Act of 1823, provided that only the Roman Catholic religion would be allowed, their state would remain sovereign, and the importation of slaves should cease. The Texans were not happy with these regulations. To further complicate matters, President Guerrero of Mexico declared slavery abolished throughout Mexico in 1829. The state of Coahuila and Texas enacted a colonization law for the state; the terms were basically the same as the previously enacted law. However, this law was to settle down the Texas colonists and their fears: "In respect to the introduction of slaves, the new settlers shall subject themselves to the laws that are now, and shall be hereafter established on the subject." Additionally in this law the governor of the state of Coahuila and Texas could send to Texas all "vagrants and criminals" for work on the public roads (Newton & Gambrell, 1935, p. 90).The Texans (or "Texians," as they were called at the time) and the Mexican government disagreed on other issues. The Colonization Law of April 6, 1830, enacted by the Mexican government only applied to Texas and forbade further colonization in border states of Mexico by immigrants. Among the various articles of the law was "provided for shipping Mexican convicts to Texas, which was regarded

by the colonists as an effort to convert the province into a penal colony for Mexico's criminals" (Newton & Gambrell, 1935, p. 97).

Mexico had failed to follow through on several agreements made with the Texians. One was a legal system of sorts. The Mexican government never fully established the judiciary in Texas (along with other public services that were not established), so there was consequently little need for lawyers to plead cases, or progress made on issues with the land grants from Mexico. During the 10 years that Texas was a republic, the Judiciary, which consisted of four district judges and a chief justice, sat together as a supreme court, even though little was accomplished.

When the Mexican government mentioned collecting taxes, the colonists gathered together and decided to fight against Santa Anna, who was on his way to Texas at that very moment to collect. The Texas Revolution would begin. The colonists met at Washington-on-the-Brazos to join the movement to uphold the rights and liberties of Texas. Some Texans held a sign over their canon "Come and Take It," which still continues to be a call of loyalty.

The Republic of Texas (1836–1846)

The Republic of Texas separated from the Mexican state of Coahuila and Texas in 1836. By 1835 Sam Houston, 6-foot-3 and 240 pounds, had moved to Texas. With the outbreak of the Texas Revolution that year he was named the commanding general of the revolutionary army. After the loss of the battle at the Alamo, Houston took command of the troops and won against the Mexican army and Santa Anna very

quickly at San Jacinto. Sam Houston, Texan general and statesman, was the first President of the Lone Star Republic of Texas (1836–1838 and 1841–1844).

The first Texas Criminal Code was developed in 1836 (Crow, 1964). Senator Francis Moore began introducing bills for a penitentiary in 1839. Senator Moore emphasized the need for punishment of the criminal as well as the profitable use of labor:

> The dictates of political economy indicate that the establishment of this institution will be fraught with important advantages to the Republic….The labor of so many criminals might under a judicious penitentiary system be made advantageous to the Republic and become a source of revenue. (Bills of the Fifth Congress of the Republic of Texas, First Session, Committee Report, as cited in Crow, p. 22)

In spite of the hard work of Senator Moore (a former Texas inmate), it was not until 1842 that the First Legislature passed into law the Penitentiary Act for a penitentiary to be built (Gammel, 1898, vol. I, p. 1247). However, this legislation never went into effect. At this time there was an extraordinary state of confusion as Texas had just been recently admitted to the Union, and another war with Mexico was imminent (*Senate Journal, 12th Legislature of the State of Texas*, 1871, p. 48).

The Lone Star Republic Joins the Union

In 1846 Texas was annexed to the United States as the 28th state, as a slave state, after being a Republic for 10 years. Boundary and water disputes have continued to present day with New Mexico, Colorado, and Mexico.

The joint resolution between the Union and Texas called for Texas to enter as a state and not a territory as previously recommended for greater control by the Union. The new state of Texas would differ from all other states by retaining its public lands. Later, Texas would use the lands to support the public education system. In fact in 2004 there are still a few school districts around the state that retained their lands, never sold them as other districts did, and now their school system operates with no debt and are financially in good condition. This is the case for Llano and Terrell counties.

Texans did not take lightly the relinquishment of their nationality. Texas will forever maintain an independent and separate attitude toward the land. The people of Texas remain supremely jealous of their sovereignty. Their allegiance to the Lone Star can supersede any other loyalty, and Texas in a sense remains a country within a country. The eulogies offered to the Republic could not express the emotions of the people who had struggled against all odds to establish a nation. President Anson Jones (1844–1846) lowered the Lone Star flag and raised the Stars and Stripes over Texas, depicted all that could ever be spoken.

> There in the eerie stillness of that gloomy winter day, sat many a weary Texan, listening silently to the fife and bugle corps as the drummers rolled off the death of their nation. With the glories of the Republic in mind, they wept bitterly. (Nackman, 1975, p. 109)

As owners of the soil, the people of Texas now would live under two flags, the Stars and Stripes and the Lone Star.

Texas as a State of the Union

The congressional act of December 29, 1845, that made Texas a state created a single judicial district over the entire state. This Texas district court was granted powers so that the new district court could hear all federal issues litigated in the state. At this time, the most pressing issues concerned boundary disputes and land grants that had been issued by Mexico, the Republic of Texas, and the new state of Texas.

In the early years of statehood, following the end of the war with Mexico, the Texas Legislature passed formal legislation providing for the construction of a state prison (Crow, 1964). However, members of the Second Legislature of Texas found the Penitentiary Act of 1846 confusing. They therefore rewrote the law. The bill that finally secured the endorsement for the Texas penitentiary received legislative approval on March 13, 1848. The Second Legislature subsequently started the penitentiary program.

The Penitentiary Act of 1848 gave Governor George Wood the authority to appoint a Board of Directors of the prison. The directors were to administer the prison like the Auburn system (Crow, 1964). The directors were to select a superintendent for the prison. Additionally, the legislators' task was to outline the rules and regulations necessary for the inmates; for instance, inmates were to be kept busy at whatever labor state officials "deemed most profitable and useful to the State." The directors and superintendent were required to make sure that the inmates were fed a "sufficient quantity" of "common but wholesome" food (Gammel, 1898, vol. III, p. 79). They also were required to make sure that inmates had prison uniforms that were

"comfortable but of coarse material" (p. 80). The Penitentiary Act of 1848 charged management with keeping the convicts employed at "proper hours for labor" (D. Walker, 1988, p. 15). Prison officials interpreted this as working from daylight to dark, a 10-hour day. When prisoners were not working, they were to be confined in solitary cells. The directors were to make all rules and by-laws for the proper mode of punishing convicts, excluding any "cruel or unusual punishment." The directors also were required to have a physician available to care for convicts (Gammel, vol. III, p. 84).

Moreover, the legislators clearly outlined the type of facility they wanted constructed (*House Journal, 3rd Legislature, Third Session*, 1849, as cited in Crow, 1964). The buildings of the new facility should be constructed of "substantial materials" and, most importantly, surrounded by a secure wall. Construction began on the new prison in Huntsville on August 5, 1848. However, construction went over budget and Governor Wood's Board of Directors were held accountable for the money and even accused of "reckless disregard for public funds" (Crow, p. 43). When the Legislature convened in the fall of 1849, the Senate immediately requested justification for penitentiary expenditures from Governor Wood and appointed a committee to investigate. The committee's report was basically favorable except that they found evidence that the building under construction was too flimsy to provide maximum security (*House Journal*, *3rd Legislature*, 1849, p. 405).

The First Prison and Convict Labor

The first prisoner arrived to begin serving his sentence on October 1, 1849 (Crow, 1964). However, the Legislature proved reluctant to appropriate money for penitentiary affairs. Governor P.H. Bell, in 1853, requested $35,000 to install a cotton and woolen mill in the prison. Bell hoped that this would make the prison self-sustaining financially and would provide labor for all inmates, and thus contribute significantly to their moral reformation and prison coffers (Crow). The Legislature appropriated the money for the purchase of the necessary machinery for the cotton and woolen mill, but decreed that convict labor was to be used for the construction (*House Journal, 7th Legislature*, 1858, as cited in Crow). The investment in the prison mill proved to be a success. The first year of operation confirmed that the cotton and woolen factories were the most successful venture yet undertaken in the penitentiary. The cloth products were eagerly purchased by Texas planters and merchants (*House Journal, 7th Legislature*, as cited in Crow).

Unfortunately, the Penitentiary Act of 1848, which provided that no "cruel or unusual punishment" could be used by prison officials or employees, had very little effect on prison punishment. Rumors circulating even as late as 1857 spread reports of severe whippings, hanging by thumbs, head shaving, and branding or maiming of prisoners (Gammel, 1898, vol. IV). By 1857, under Governor G. Hardin R. Runnels, the convict population had outgrown the prison. Governor Runnels appointed a committee to study the issue and decide if the facilities at Huntsville should be expanded or a new building established on another site. After studying the many

possible locations, the committee decided on Jefferson, which at that time was an important commercial point in East Texas (*Senate Journal*, *8th Legislature of the State of Texas*, 1861).

Shortly after Governor Sam Houston assumed office in 1859 he instructed the board of directors to make an examination of the penitentiary. He was especially concerned about the accounts and the convict labor. Houston wanted to know where each man worked, and if he worked outside the walls (in direct violation of the law). Houston demanded to know for whom the convict worked, for how long, who authorized the assignment, and who benefited in the long run. Houston wanted the directors to check into the food and see if it met the standard rations set by law (Houston, 1859). However, Houston's administration ended abruptly when he refused to pledge allegiance to the Confederate States of America, and Lieutenant Governor Edward Clark became Governor upon Houston's removal.

Texas and the Confederacy

Texas seceded from the Union in 1861, and the Civil War lasted from 1861 to 1865. Issues with the Union centered on slavery. The chairman of the secession convention, former Confederate Colonel Oran Roberts (later to be governor) stated, "We must form a white man's Government that will keep Sambo from the polls" (Campbell, 1989, p. 272). James W. Throckmorton, (1866–1867) and his followers declared that they had no intention of extending equal rights to Blacks or making any radical changes (Campbell, 1989). Williams (1997) wrote, "The investment in

enslaved human beings brought profits, and unfortunately, the state's economy came to depend on slavery" (p. 38). According to Williams, "A slave within the peculiar system of slavery in Texas was not allowed basic human rights" (p. 39). It was slavery and the slave trade that provided the initial thrust to the Texan economy. It was slavery that built Houston and Galveston.

At the core of the violence and warfare marking Texas history was a series of ethnic problems. The first and most serious ethnic problem in Texas centered on the African American. The institution of Black slavery—originally imported to solve the labor shortage—determined the course, and the fate, of the South. The myth of White supremacy over the slaves required rationalization to prevent social change no Southerner wanted. In 1860 the slave economy was producing enormous profits, although at a high social cost. When this economy was destroyed by war, the purpose of the African American's existence in Texas changed. Blacks in Texas had always lived in a "separate country," with separate laws from the dominant White folks. The new development was that slavery was renamed as a new *caste system*, basically not a change. The tragedy and error was that the caste system provided no means for social elevation and change. The caste system did nothing to provide Blacks the means to enter the American life on an equal, even if separate, basis with White society. The faceless slave became the faceless sharecropper, tenant worker, and leased prisoner within the new caste system.

The Civil War had derailed the work of the federal court for a time. Texas' two federal judges had opted for the Union and spent the war in the North when

Texas seceded. Therefore, during this time the court was closed. For this reason, one of the first acts of the Confederate Congress, following secession, was to organize a judicial system. On March 16, 1861, the Confederate Congress passed "an Act to Establish the Judicial Courts of the Confederate States of America" (Zelden, 1993, p. 21). Two district courts were established in 1861: the Western District and the Eastern District. Nevertheless, in 1865 both of Texas' Confederate district courts closed their doors and never had a chance to construct a new judicial framework for the region (Robinson, 1941).

Slaves of the state. During the Civil War, the Texas penitentiary was of critical importance to Texas and the Confederacy, as it made a profit and provided prisoner-made cotton and woolen materials to be sold and used by the Confederacy. The mill constituted a major source of revenue for the Texas penitentiary during the war.

By 1862 penitentiary overcrowding and labor needs affected the issuance of pardons for the convicts. If space was at a premium and the labor was not currently needed, then prisoners received pardons and went home. However, when the penitentiary needed laborers, such as during the Civil War, there were few pardons. This same policy operates today at TDCJ.

Texas Rejoins the Union in 1869 and Reconstruction in Texas (1865–1876)

When Reconstruction began, the Texans had to swallow defeat, accept the end of slavery, and renew their allegiance to the United States (tall order for some).

Further, Texas was to write a new Constitution that would include ratification of the Thirteenth and Fourteenth Amendments. They refused. Blacks faced an even less promising future. In response to the Union demands on Texas, Black Codes were developed to allow the Whites to have some sense of control over Blacks. Later the Black Codes were part of the Jim Crow Laws. The Black Codes and Jim Crow Laws shamefully remained part of the culture in Texas and throughout the United States for many years, even after new laws were passed to eliminate these behaviors.

Federal authority arrived in Galveston in yet another form in 1865, when General Edgar M. Gregory reached his headquarters as the state's first Assistant Commissioner of the Bureau of Refugees, Freedmen, and Abandoned Lands. Established by Congress under the Department of War, the Freedmen's Bureau, as it was generally called, had the primary responsibility of helping Blacks adjust to freedom. Providing relief for the destitute was a relatively minor problem, but the bureau's efforts in supervising labor contracts, establishing schools, and protecting Freedmen against violence drew opposition from many Whites. In 1866 a common form of agriculture employment was the "contract labor system." The Freedman's Bureau was to review the contracts and make sure they were fair and equal. However, in January 1867 General Joseph B. Kiddoo of the Freedmen's Bureau declared the contract wage law biased against Freedmen and prevented its enforcement. Generally, this made the other labor codes useless.

Restrictions on civil rights crumbled with the beginning of Congressional Reconstruction following the Presidential Reconstruction in March 1867 and the

registration of Blacks as voters (which continues to be challenged). Segregation survived despite attacks upon the practice throughout Reconstruction. For Northerners, the most immediate effect of the codes was to hasten the end of Reconstruction and lead to new federal intervention under the direction of Congress. This meant that many Blacks stayed working on the plantations, in domestic jobs, or in the prisons, where they were then leased out to plantation owners who had lost their slaves under the Thirteenth Amendment. This era of contracts also included systems of sharecropping. During the 1870s sharecropping, being a form of tenancy, was a kind of servitude.

A majority of Texans held a negative view of Reconstruction. Reasons for this interpretation of Reconstruction are not difficult to find. Congress, using the army as a means of enforcement, did indeed act in ways that most White citizens of the Lone Star State saw as arbitrary, radical, and even revolutionary. Some Whites were disenfranchised, and numerous office holders were removed from positions to which they had been duly elected in 1866 because they had been Confederates. During this short honeymoon after the war, Blacks were encouraged to participate in the political and legal systems, especially to register to vote. These events, and many others, "proved" to the Texans that Reconstruction was imposed from the outside the state and certainly not to be trusted. Texans strongly objected to the idea that all citizens after 1865 were entitled to equal political and civil right or that the national government should not have forced the state to do such. The imposition of military rule on Texas from the outside was humiliating to its citizens. The citizens of Texas

believed that they had fairly elected their officials, and the feds came in and changed them to union sympathizers. This negative view of Reconstruction in Texas prevailed. It has been suggested that this era, so full of bitterness, shaped the general lack of concern for civil rights that has characterized Texas politics after the 1870s (Campbell, 1989).

Post–Civil War Reconstruction: The Return of Federal Courts

Within a few days after the assassination of President Lincoln, President Andrew Johnson (Presidential Reconstruction) declared that the rebellion in Texas had ended and control of the state would be returned to "civil authorities." However, this was not to happen. The new Texas legislature, just as the attendees to the convention, refused to ratify the Thirteenth and Fourteenth Amendments. The Fourteenth Amendment defined citizenship to include Blacks and prohibited state action that denied equal protection of the laws to any citizen. Additionally, the Amendment required an oath of allegiance to the Constitution of the United States. Those who had engaged in the rebellion could not hold public office without a two-thirds approval of both houses of Congress. This part would obviously rule out all of Texas prewar leaders. Small wonder that the Texas Legislature rejected it. The Southern attitude of lack of penance and unwillingness to accept change was quite clear.

As Congressional Reconstruction (1867-1870) took over from the Presidential Reconstruction (Andrew Johnson), Texas was about to change, this time under the

direction of the U.S. Army. Once Texas was under military control as ordered by General Phillip Sheridan, numerous complaints came from Unionists about their treatment in Texas courts. The general issued an order requiring all jurors to swear to the Test Oath of 1862 that they had never voluntarily supported the Confederacy. Obviously, this order made the great majority of White men in Texas ineligible to serve. Governor A. J. Hamilton considered the Jury Order "outrageously wrong." The District Judges reacted largely as they chose. Some complied as fully as possible with the order, and others simply closed their courts without making a genuine effort to find jurors (Campbell, 1989, p. 276). Texans' worse fears were coming true about the imposition of the authority of the federal government.

Black Codes were the laws passed by Southern state legislatures to define the "legal place" of Blacks in society after the Civil War. In Texas, the Eleventh Legislature produced these codes named The Texas Act of 1866. The purpose of the act was to "define and declare the rights of persons lately known as Slaves, and Free Persons of Color." The Texas Act of 1866 functioned as the keystone of the majority of the Southern states' civil rights legislation. Free Blacks could make and enforce contracts; sue and be sued; make wills; and lease, hold, or dispose of real and personal property. The state further guaranteed Blacks the rights of personal security and liberty and prohibited discrimination against them in criminal law. Surprisingly, this act specifically left in effect a variety of earlier legal restrictions. Blacks were not allowed to vote or hold office, they could not serve on juries, and they could testify only in cases involving other Blacks. They could not marry Whites. These restrictions

were supplemented by other legislation in differing jurisdictions. For example, the state required railroads to provide separate accommodations for Blacks, thus establishing the precedent for segregation in public facilities, including across state lines.

An education law specifically excluded Blacks from sharing in the public school fund. The state's homestead law prohibited the distribution of public land to Blacks. The codes reflected the unwillingness of White Texans to accept Blacks as equals. Further, Texans feared that Freedmen would not work unless coerced. Reality was that the motivating force behind the formulation of the codes was that the plantation owners were in dire need of laborers after the war. The Black Code legislation, lacking in subtlety, intended to reaffirm the inferior position that slaves and free Blacks had held in antebellum Texas back on the plantations and to regulate Black labor. A variety of sources provided the pattern for the new codes.

With the end of the Civil War and the defeat of the Confederacy in 1865, there was a definite downturn in the fortunes of the prison and Texas. The coarse fabric that once found a ready market as clothing for slaves no longer appealed to Texas consumers, and the Confederacy was obviously not buying. The prison also faced chronic problems procuring sufficient quantities of the raw fiber to keep the machinery in operation. The prison soon became a financial drain on the state budget, and overcrowding returned with a vengeance, due to the rapid increase in the prison population following the war. Overcrowding continues today to be a problem for TDCJ.

Texas had escaped any major invasion of its interior by Union armies during the war. However, Reconstruction for Texas was definitely not a pleasant experience, especially when U.S. President Andrew Johnson sent in the military to take control of the Texas state government. Governor James T. Throckmorton was removed from office by military order because he was considered an "impediment to reconstruction" (Richardson, 1958, p. 208). Union generals were offended by Throckmorton's refusal to pardon 227 "negro convicts" who purportedly had been sentenced to the penitentiary for trivial offenses. Thus began the period of assertive federal reconstruction in Texas, backed up by the Freedman's Bureau and Union occupation troops.

Texas officials considered leasing the prison, or contracting out inmate labor, a drastic method of penitentiary management (*Senate Journal*, *11th Legislature of the State of Texas*, 1866, p. 35). Leasing of the penitentiary labor was provided for in a bill introduced by Senator Benton Randolph (*Senate Journal*, *11th Legislature*). Due to money issues the Texas Legislature did turn to leasing out the prison and the prison labor.

The federal courts reopened in 1866 and were immediately inundated with cases generated by the social and political reconstruction such as the Civil War Amendments to the Constitution that officially freed slaves and granted equal rights of citizenship (Thirteenth), due process of law to all citizens (Fourteenth), and the extension of the franchise (Fifteenth). Additionally, the courts faced an influx of prisoners due to the general unrest and lawlessness of the readjustment period

following the Civil War, including the freeing of the slaves. The Emancipation was met by Southern Whites with Black Codes, Jim Crow laws, and sending Black citizens to prison when labor was needed. Under the pre–Civil War penal code, "Negroes" were not subject to imprisonment in the penitentiary; the master of the slave inflicted punishment without trial. With this new and confusing liberty, the "Negro" found himself entangled in a legal system that he did not fully understand, which most often sentenced him to prison. Little effort was made to publicize to lawyers or the public the provisions of laws such as the Civil Rights Acts of 1866 and 1875.

Plantation owners were hurting for labor; the prison would then lease out the convicts to the plantation owners. Prison rolls increased dramatically, and Blacks accounted for over 40% of the prison population. This population was comprised mostly of freed slaves, whom many legislators believed should not be citizens at all. Texas leaders refused even to ratify the Thirteenth Amendment abolishing slavery, much less the Fourteenth protecting freedmen's civil rights (Barr, 1973).

"An Act to Provide for the Employment of Convict Labor on Works of Public Utility," passed on November 12, 1866, created the Board of Public Labor to supervise prison inmates. This law defined "works of public utility" as

> the building of railroads, including the making of the grade, the cutting and laying of ties, and the laying of track; all works of improvement of navigation of rivers, bays, channels, and harbors; for irrigating lands; and all workings of mines of iron, lead, copper, iron, coal, or of gold and working in iron foundries. (Gammel, 1898, vol. V, as cited in D. Walker, 1988, p. 19; Crow, 1964, p. 71)

Prison superintendents were permitted to seek employment for their inmates. Prison officials generally transported the prisoners to work and guarded them on the work site.

In the summer of 1868 delegates to the Reconstruction Convention convened in Austin to draft yet another state constitution. A committee was appointed to examine the conditions in Huntsville prison, particularly prison finances, the care that inmates were receiving, and the number of inmates. The report painted a dismal picture. The committee found that overcrowding was a serious problem (creating a health hazard should an epidemic occur) and that the prisoners were not adequately fed or clothed. On the subject of prison finances, the committee had nothing favorable to report. The committee was not able to locate an organized system for keeping the penitentiary books and accounts. The committee concluded that in the absence of accepted bookkeeping procedures, mismanagement would be inevitable and in all likelihood the prison would be "a source of great corruption" and a drain on the state treasury (*Journal of the Reconstruction Convention*, 1868, pp. 803–804, as cited in Crow, 1964, p. 75). The committee's scathing report concluded that "widespread corruption would continue to erupt under state control" (Crow, p. 75). One major recommendation of the committee to the Reconstruction Convention was leasing the entire penitentiary. Thus, Governor Elisha M. Pease in 1868 urged the convention to lease the labor of all the convicts to the highest competitive bidder (*Journal of the Reconstruction Convention*, as cited in Crow). The mission of the Texas prison

system had begun to shift from offender reformation to labor control, especially for Black men.

However, President Andrew Johnson replaced Governor Pease with E. J. Davis (1870–1874), a Union sympathizer during the Civil War, and sent in federal troops. The result was confusion about the control of the penitentiary. Davis requested a report on the prison. The *Report of the Conditions of the State Penitentiary* (1870) described the prison as being in a "miserably filthy condition" (p. 5). The report stated that the disregard for hygienic regulations rendered many convicts incapable of work. All convicts, regardless of age or sex, were confined in the same building, sleeping on mattresses less than 3 feet long. The report also included cases of alleged unjust incarceration, such as "Union men and Negroes" (*Report of the Conditions of the State Penitentiary,* 1870, p. 10, as cited in Crow, 1964, p. 78).

Financial problems continued to haunt the penitentiary and a dispute developed among the officials at the penitentiary. In 1871 Governor Davis appointed a committee to investigate all penitentiary affairs. The findings of the committee included

> A recommendation to the Legislature that the entire force of convict labor be leased to an astute businessman who might be able to make the penitentiary self-supporting and to adopt definite forms of punishment for the convicts to protect them from the brutality found in many instances. (*House Journal*, *12th Legislature*, 1871, First Part, p. 602)

The committee and others appeared to have lost sight of one of the main goals of the penitentiary, which was to rehabilitate the prisoners so that upon leaving prison they

are law-abiding and self-respecting citizens. The question that should have been asked at that time was whether rehabilitation would be possible under the supervision of men whose sole aim was to profit from the convicts' labor.

Commodity Speculation: Prison Leasing

In March 1871 the Legislature passed "An Act to Authorize and Require the Governor to Lease the State Penitentiary Together with the Labor of the Convicts Therein" (*House Journal*, *12th Legislature*, 1871, First Part, p. 534). In practical terms, turning over the prison and its convicts to private contractors would relieve the state of penal responsibility, thereby freeing scarce government resources for other priorities. Advocates for prison reform later would view this Act as an element of private economic interest within the penal institution; the law ignored the reformative aspects of any penal philosophy. "The state was embarking on the devilish and barbarous system of trafficking in human muscles and bones, weighing the convicts in the scales with gold….Nothing would now stand between the convicts and a living hell" (Crow, 1964, pp. 82–83).

Citizens found the "sale" of human beings simply because they had been convicted of a crime disgraceful. These citizen advocates believed that the penitentiary, as the name implies, "was never intended as a human mart where able bodied men were bartered away for a long term of individual servitude at a figure absolutely degrading to labor" (Crow, 1964, p. 83). It was clear that convict leasing was a form of commodity speculation. Prison officials and legislators intended the

prison to be clean, self-sufficient, make a profit, keep escapes to a minimum, and define the social status of former slaves.

Influence peddling and political favors would play a central role in convict leasing. Beginning in 1871, Texas accepted the bid from private contractors Ward, Dewey, and Company. The contractors were to have full control over the inmates, including their upkeep and discipline, and the prison physical plant in return for sizeable payments to the state. In the company's first report in 1871 they found

> the penitentiary was heavily in debt, without supplies, money or credit, and both the officers and convicts greatly demoralized in a state of complete insubordination bordering on mutiny. The prisoners were inadequately clothed, subsisting on cornbread and beef, eaten in their vermin-infested cells without knife, fork, or spoon. (*Report of the Commission Appointed by the Governor of Texas*, 1875, p. 41)

At the time Ward, Dewey and Company assumed management, the convicts were widely scattered in labor camps on farms, sawmills, and railroads, in addition to the cotton factory behind the walls. Ward, Dewey and Company soon found that if all the convicts were confined within the walls of the penitentiary, according to law, their labor could not be made to support them. So they contracted the convicts to plantation owners, railroad constructing companies, and other employers in need of a large, cheap labor force. Multiple stories emerged describing the cruel and inhumane treatment of convicts.

> The treatment of convicts assumed an even harsher aspect than did chattel labor, for the owner of the slaves at least wanted to protect and conserve his personal property. The lessee was concerned with only the labor output and not at all with the methods employed by the overseers to obtain that end. The irresponsible brutalities commanded the attention of responsible citizens who in turn demanded a legislative investigation. (Crow, 1964, p. 98)

One lessee reported around 1883, "Before the war, we owned the negroes. If a man had a good Negro, he could afford to keep him….But these convicts, we don't own them. One dies, get another" (cited in Mancini, 1996, p. 3). "One dies, get another": No apothegm could better capture the distinctive feature of convict leasing and the origins of its brutality (Hart, 1919).

Although prison labor earned handsome profits, the human cost, in the opinion of some people, was too high. After finding evidence of brutality, the U.S. Army ordered all military prisoners confined in the Texas penitentiary removed to Kansas. Upon arrival at the Kansas State Prison, the military prisoners were examined and interviewed. The report described dreadful living conditions and brutality in the Texas prison. Kansas penitentiary officials opined that the lease system as it operated in Texas made the convicts slaves of officers who often were more brutal and criminal than the worst convicts (*Report of the Commission Appointed by the Governor of Texas*, 1875, p. 81). At this same time the *Galveston Daily News* published a series of articles entitled the "Horrors of the Texas State Penitentiary and Brutality of the Lessees" (1876, as cited in Crow, 1964, p. 102). The public and the press demanded legislative changes in the treatment of the convicts.

> Traffic in "convict slavery" was the predominant feature of the lease system. The convict lost his identity as a human being, becoming *a pawn on the chess board of Texas politics*, to be moved by the exigencies of public demand. (Crow, p. 94)

Investigations revealed horror stories of cruelty surrounding the contract practice (Crouch & Marquart, 1989). Prisoners described "sun to sun" labor, food

"that buzzards would not eat," and sleeping quarters "infested with vermin" (D. Walker, 1988, p. 34). However, the Legislature concluded that it was better for the state financially to retain the leases. Despite numerous commissions and reports that the convicts were being mistreated, no action was taken. Convict leasing continued slavery under a new name. The Legislature allowed the governor to cancel the contract with Ward, Dewey and Company in 1876. Several legislators suggested an agreement be made with the railroad companies to employ convicts to lay track across Texas.

In 1878 a new lease was issued to Cunningham and Ellis and many of the convicts were put to work on the Texas and Pacific Railroad. Additionally, an iron ore smelter was built at the new Rusk Penitentiary in East Texas. Convicts worked on state-owned farms. The newly created Penitentiary Board (formerly called the Board of Directors) was instructed by Governor Oran M. Roberts (1879–1883) to "manage the penal institution, to rebuild and modernize the prison plants, and to lease any part in the best interest of the state…profitably employed" (Gammel, 1898, vol. IX, pp. 130–142). Crow (1964) wrote, "The result was the creation of a penal system dedicated to showing a profit rather than to keeping of convicts in the interest of law and order…each convict should be incarcerated in a place most profitable to the state" (p. 125). The lease with Cunningham and Ellis was profitable for the state.

However, the public continued to demand more investigations into the lease system. One newspaper, the *Texas Sifting,*

> accused the Penitentiary Board of consigning convicts to slavery, worse than Egyptian bondage, crueler than Russian serfdom, and more atrocious in its physical and metal torture than the treatment of the convicts of the galleys of Southern Europe. (*Texas Sifting*, 1883)

The state was divided into two parties: lease and anti-lease. In 1883 the debate became heated. Senator A. Chesely forcefully contended that the primary object of the lessees was to make money out of the convicts (*Austin American-Statesman*, 1883b). The anti-lease stance was explained by Senator A. W. Terrell:

> The leases were a disgrace to civilization, blackening to the name of Texas, distasteful to every sentiment of morality, and absolutely subversive in every purpose for which penitentiary systems were adopted by governments. Terrell said that the first objective of the code of criminal procedure was to reform the offender and deter others from following his example. Texas did not desire the death or torture of any of its citizens, yet the recent history of Texas was full of evidence of the horrors of the lease system. (*Austin American-Statesman*, 1883, as cited in Crow, 1964, pp.134–135)

Terrell maintained, "The time was at hand to change the system whereby two firms could move around the state and barter for profit over two thousand human beings" (*Austin American-Statesman*, 1883, as cited in Crow, p. 135). Senator W. O. Davis presented many reasons why the state should renew the leases, including the following:

1. The state always had trouble managing anything well.
2. The lease was made by good men, and therefore it should be ratified.
3. The lease was the policy that humanity dictated.
4. Under the lease the convicts would be whipped, starved, tortured, and overworked (*Austin American-Statesman*, 1883a).

The anti-lease forces defeated ratification of the leases in 1883 and passed a law instructing the Penitentiary Board to confine all convicts within the walls of the penitentiaries as soon as suitable prisons could be provided. Once more, the state of Texas assumed sole authority over its convicts. The convicts were to be employed in such a manner as would make the prison system self-supporting. Until adequate provisions could be made, the board was authorized to work the convicts by contracting their labor to private individuals The Penitentiary Board was authorized to purchase penitentiary farms upon which all convicts might be worked by the state.

The Act of April 18, 1883 marked the end (hypothetically) of the experiment to lease out the entire prison system to a private individual or company and ushered in a policy known as the *contract labor system*, basically the same as the lease system. Under this plan the various industries connected with the penal institution were contracted to private citizens along with the labor of the convicts (*Austin American-Statesman*, 1883c). Although inmates were leased to private operators, shops were maintained within the prison walls.

> No forms of profit-making enterprise—not even slavery itself—presented the horrors which accompanied the convicts from the time they left the jail until the expiration of their sentences in the penitentiary….The politicians were satisfied with the monetary returns from such an arrangement. (*Austin American-Statesman*, 1883, as cited in Crow, 1964, p. 141)

Under the lease system the life of the convict was in jeopardy. Many convicts contracted diseases, yet continued to be assigned to hard manual labor until they broke down or died (Prison Reform Association, 1873, as cited in Crow, 1964). The mortality rate was high for convicts in wood-cutting camps and on farms (*Biennial*

Report of the Commissioners and Superintendent of the Texas State Penitentiary, 1878, pp. 17–18). Medical care was hard to find. State inspectors acknowledged that some contractors violated the rules and were guilty of inhumane treatment (Spaw, 1999). Many prisoners cut off their hands or cut their tendons to avoid the inhumane treatment. Toiling from sun up to sun down, without compensation, convicts followed the commands of field drivers in hoe lines and paced themselves to slavery-composed work songs.

Debate continued in the Legislature over the positive and negative benefits of the convict-lease system. A few senators objected to land owners "amassing great fortunes by the use of convict labor" (D. Walker, 1988, p. 77). The corruption was not limited to the land owners and the lessees. The lessees gave money to the legislators. However, at that time it was considered "vulgar" to give cash directly to elected officials; therefore, legislators were allowed to win at poker. The Legislature was then known as the "poker legislature."

Others were pleased that both the state and the counties were profiting from convict labor. In 1885 convicts were leased to the contractors building the state capitol in Austin, quarrying and dressing the limestone for the Capitol's inner walls at Oatmanville and the granite for the outer walls at Marble Falls. The Rusk Penitentiary agreed to make the casting for the capitol, including the dome, which called for about 2 million pounds of iron. By 1889 public dissatisfaction became acute, and the warden at Huntsville recommended terminating all leases.

Meanwhile, the Penitentiary Board continued to purchase land for penitentiary farms. Governor Lawrence Sullivan Ross (1887–1891) expanded the agricultural facilities of the prison system. In his speech upon leaving office he reiterated that it would be disastrous for a prisoner to sit in idleness; therefore the prisoner must engage in profitable labor for the state (Crow, 1964).

Between 1886 and 1888, 256 inmates died (Spaw, 1999). As a result of the public outcry the Legislature passed a law that prescribed in detail what could and could not be done in administering punishment. Governor James S. Hogg was a frequent and unannounced visitor to the penitentiaries. Governor Hogg (1891) believed that when a court consigned the convict to "the penitentiary at hard labor," it was not good policy for the state to lease the convict to private corporations or individuals. Moreover, leasing continued. In a widely publicized 1897 address, University of Texas President George Winston expressed the sentiments of many Whites when he postulated, "The Negro is more criminal as a free man than he was as a slave" (Ayers, 1984, p. 290).

Leasing to private contractors and mining and railroad companies continued until adequate farm land could be purchased by the state. During this period, the first penitentiary railroad was constructed to serve state-owned land between Rusk and Palestine. At a later date the Ramsey Railroad was extended to move sugarcane from the Ramsey farm to the sugar mill on the Clemens farm, both owned by the prison system.

Early 1900s

Meanwhile, concerns about the treatment of the prisoners continued after the turn of the century. In 1902 scandals connected with the convict-lease system surfaced once again. The Legislature passed another penitentiary bill that included a date to discontinue the contract prisoner system throughout Texas (*Record of the Evidence and Statements Before the Penitentiary Investigating Committee*, 1913, as cited in Crow, 1964, p. 182). Yet it continued. Most Texas convicts remained poor, Black, and socially marginalized, a pattern that has changed little.

During the administrations of Governor S.W.T. Lanham (1903–1907) and Governor Thomas M. Campbell (1907–1911), the prison system showed a considerable profit (*House Journal, 28th Legislature*, 1903; *House Journal*, *29th Legislature*, 1905). An audit of the prison's financial records revealed that the profits were obtained primarily from the continued leasing of convict labor and not from the various prison industries. Meanwhile the publication of articles exposing the abuses and atrocities committed in the Texas penitentiaries continued. The *San Antonio Express* (1909) noted,

> The Spanish Inquisition paled into insignificance when compared with the methods used in the Texas prisons, for the system of capital punishment was barbaric and the men inflicted it should be prosecuted. According to evidence offered by Briggs [author of articles] when a convict was whipped, he was stripped and made to lie flat on the floor while the guard would administer as many as 106 lashes. (p. 32)

Governor Campbell originally ridiculed the publication, but the legislature forced him to appoint a committee to investigate the allegations even though he expressed

disbelief at any abuse. The committee only suggested that one of the mining operations be closed due to the treatment of the convicts and recommended the continued us of the "strap" with some size modifications. In 1913 the Legislature again attempted to eliminate the leasing and contract system.

In 1913 Governor Oscar Branch Colquitt (1911–1915) announced to the 33rd Legislature that the system of leasing convicts would end on January 1, 1914. Colquitt was aware that this would severely reduce the prison system's revenue. Colquitt had tried to put a stop to the leasing in 1911 shortly after he took office. But financial expediency dictated that the leasing be continued for another 3 years. Colquitt (1913) told the 33rd Legislature that he

> accused his predecessors of measuring the convicts by dollars and cents, by the money they could make for the state and for the men to whom they were leased. The convicts had been driven by the "bat" and chased by bloodhounds so that selfish men might profit from their labor and unscrupulous politicians might thrive through the manipulation of their potential….He wanted to wipe out the brutalities that had been practiced against the convicts in the past. (p. 62)

However, the farm managers protested. Their biggest concern was that the prison system could not be made self-sufficient without the use of the whip (*A Record of the Evidence and Statements Before the Penitentiary Investigating Committee,* 1913).

Colquitt's administration limited the use of the "strap" for whippings of the prisoners. However, Governor James E. Ferguson (1915–1917) reinstated the use of the whip with some restrictions. Governor Ferguson's support of controlling the convicts by the fear of the whip was well known. Ferguson also purchased 19,100 acres to add to the prison system's farm production. It appeared that the policies of

Governor Ferguson might bring the prison system out of debt. However, in 1917 Governor Ferguson was impeached by the House of Representations, and Lieutenant Governor William P. Hobby became acting governor.

Governor Hobby (1917–1921) inherited a prison system seriously in debt and overwhelmed with problems. After termination of the leases legislators had discovered how much profit had been in contract labor. Neither reformers nor legislators had anticipated a problem with the state's assuming responsibility for the finances of the prison system, because the lessees had made a profit. However, the Texas prison system incurred a huge debt during these years.

The industrial experiments had failed, including the iron industry at Rusk, the two sugar mills at Harlem and Imperial Farms, and the box factory at Rusk (*Senate Journal, 33rd Legislature of the State of Texas,* 1913). The investigating committee found that those in authority on the farms and those who held the contracts had again ignored the rules regarding personal care and cleanliness of the convicts, sufficient food, adequate clothing, and brutality. Some contractors, such as the Imperial Sugar Company, benefited handsomely to the detriment of the system and the prisoners. The committee found that convict labor had been used without recompense to clear and cultivate lands owned by private citizens (*Report of the Committee of the Senate and the Central Executive Committee of the House*, 1918). The state railroad continued to operate at a loss. Governor Hobby sold the iron industry at the Rusk Penitentiary to the Texas Steel Company from Beaumont, in which Hobby owned stock (Crow). The Texas Steel Company continued to buy the ore from the state. Additionally, the box

factory at Rusk was to be sold. The Rusk penitentiary was then turned into an "asylum for insane Negroes" (Crow, 1964, p. 236; *General Laws, 35th Legislature,* 1918, p. 207).

The 1920s

When Pat M. Neff became Governor (1921–1925) he discovered that the successful financial operation of the plantation-based prison system during the Ferguson and Hobby administrations was not the result of good management so much as the large increase in the price of cotton. By 1921 the price of cotton had returned to normal, and the prison system had returned to deficit funding.

Through the 1920s and 1930s, the state-run prison ran a deficit. The shift from private contracting to prison control was very costly. Additionally, charges continued against the prison system of brutality and inhuman treatment of the convicts; financial irregularities and graft; theft by employees; and lack of clothing, food, and medical care.

Governor Miriam A. Ferguson (1925–1927) was elected in 1925. The aggregate conditions had increasingly deteriorated, and the system was about $1.2 million in debt (*Senate Journal, 40th Legislature of the State of Texas*, 1927, p. 389). Governor Ferguson's main effort at solving these problems was a liberal policy of pardons. She believed that Texas courts often sent poor people to the penitentiary for minor offenses, particularly prohibition, while the rich committed the same crimes and escaped punishment. Accordingly, Governor Ferguson released more than 2,000

convicts during her 2 years in office, which also helped with prison overcrowding but infuriated many citizens.

Texas voters ratified an amendment in 1926 that authorized the Legislature to pass such laws as were necessary for the management and supervision of the Texas prison system. One of the first actions of the 40th Legislature was to abolish the Prison Commission (under whose authority so many complaints had been received) and create the Texas Prison Board. The immediate legislative directive to the board was not convict welfare, but "how best the penitentiary might be made useful and beneficial to the state" (Crow, 1964, p. 251). The creation of the Texas Prison Board was an effort to discontinue the practices of allowing the penitentiary system to be manipulated by the vicissitudes of politics, because the state prison system was considered to be a part of the political family of the governor.

Governor Dan Moody (1927–1931) found that prisons still had the same problems of overcrowding, inadequate housing, diseases, and minimal medical care. Governor Moody described the situation as "disgraceful, wasteful, and dangerous conditions in the prison system" (Campbell, 1989, p. 358). Moody proposed to the Legislature a complete reorganization and centralization of the prison system. Moody got the Legislature to create a committee to study the prison system and the prison systems of other states and then make recommendations for the revision of the penal policies in Texas. In 1927 the Texas Prison Board was created. Among Moody's suggestions was the use of convicts to construct state highways.

The 1930s

In 1930 the Texas Prison Board issued a surprising milestone order: No more convicts would be admitted into the state penitentiary at Huntsville or any of the prison farms "until the normal capacity of the system was reached" (*Dallas Morning News*, 1930a, p. 7). Governor Moody contended that the fundamental cause of the failure of the prison system was that prison problems had never been given proper legislative consideration. Accumulated losses amounted to a tremendous sum, and the pile of human wreckage that the prison system had left in its wake over the years was too appalling to contemplate (*House Journal*, *42nd Legislature*, 1931, pp. 22–23). Moody also called for providing a place for the confinement of the criminally insane.

Governor Moody appointed Lee Simmons as general manager of the Texas prison system in 1930. His first instructions were to reform the prison and promote a positive image of the system. Simmons seemed to make impressive changes in the system; he voiced concern about the welfare of the convicts above politics and tried to wrest the prison system from the grip of those who used it to further their political and financial careers (Crow, 1964, p. 272). Observers were under the impression that Simmons' policy was to look after the health, education, general welfare, and rehabilitation of the convicts to the highest possible degree commensurate with justice, fairness, and common sense, in keeping with the interest of both convicts and the public (*Dallas Morning News*, 1930b, cited in Crow, 1964, p. 272). Simmons thought that convict labor should be educational so that the convict, when released from prison, would have the advantage of a trade and thus would be able to earn a

wage. Simmons made many physical improvements to the buildings and reorganized the management of the industries and farms. He increased herd production; by 1933, 71% of the food consumed by convicts in the system was produced on prison farms (Texas Prison Board, 1930, p. 77). Simmons inaugurated the Texas Prison Rodeo in 1931. Simmons secured the services of the Justin Boot Company of Fort Worth to set up a modern shoe factory. He constructed a garment factory on the Goree farm. An automobile license plate plant was completed at the Huntsville unit in 1934. In 1935 Simmons erected the brick plant at the Harlem farm. Commissioner Simmons exerted tremendous effort to make solid changes, as he visualized them, in the system. However, he was only able to bring limited financial improvements to the prison system. The Depression had redirected public sentiment to other economic activities.

Moreover, Simmons was not shy in stating that he maintained great faith in the effectiveness of the "bat." He contended that confinement on bread and water injured the health of the convict, but he felt that the bat to a prison warden was like spurs to a cowboy—One might not have to use it, but, if the occasion should arise, it was the most effective weapon in maintaining control in the prison (Crow, 1964, interview with Simmons, p. 238). During this period, the *Houston Press* reported a story in 1935 about prisoners who, to escape brutal beatings by sadistic guards, slashed their Achilles tendons, blinded themselves with lye, and cut off their own feet and hands. This behavior was not new; it had occurred over the years within the prison system (*Houston Press*, 1932, 1935, as cited in Crouch & Marquart, 1989, p. 23).

W. Lee O'Daniel was governor from 1939 to 1941. In an effort to make the system self-sustaining Governor O'Daniel built a textile mill in Huntsville. Production in the beginning consisted of coarse sheeting for rice sacks. Soon the mill produced fabric for the convicts' shirts and pants again. The mill also produced all the necessary linens needed by the prison system and other state institutions. Governor O'Daniel directed the production of sugar and syrup needed by the prison at the sugar mill at the Ramsey farm. However, with the outbreak of World War II, the prison farms were neglected and the prison population declined.

Sallas Committee Report

In 1943 Governor Coke Stevenson (1941–1947) appointed yet another committee to investigate the penitentiary. J. B. Sallas, committee head, wrote in the report, "The prison management was working convicts in the fields wearing shoes that barely hung on their feet, allowing the convicts to be whipped, shot at by the guards, and placed in dark cells where they were made to sleep like animals on the floor" (*Dallas Morning News*, 1944, p. 4, cited in Crow, 1964, p. 329). The Sallas committee found convicts who cut their tendons, broke their arms, or inflicted serious injury to themselves in order to avoid another whipping by the lash. Sallas contended that the board members and the public were deprived of essential information, the truth, by a self-protecting veil of secrecy developed by the prison system (*Dallas Morning News*, 1944, cited in Crow, p. 329). Governor Stevenson commented on the Sallas report, "We get mail regularly from prisoners seeking clemency and there has

been no complaint from them" (*Dallas Morning News*, 1944, p. 8, cited in Crow, p. 329).

Austin MacCormick Report

In spite of the secrecy behind the walls, in 1947, the Committee on Prison Work of the Texas State Council of Methodist Women complained to the state prison board about documented reports of ill treatment (Martin & Ekland-Olson, 1987). As a result the board hired Austin MacCormick of the Osborne Association to survey the Texas prison system. The Osborne Association was a prison reform organization with a well-respected reputation. MacCormick's report in 1947 was highly critical of the prison conditions (Martin & Ekland-Olson). Overall conditions had deteriorated at Huntsville. There were 1,500 inmates at a unit designated for 1,200 and usually one toilet for 20–40 men. Accommodations for the guards were worse than for the prisoners and conditions on the farms far worse than the main unit. Morale was virtually nonexistent, inmate disturbances were common, and self-mutilation was the norm, committed more in sheer frustration than in resistance to authority. MacCormick reported continued brutal treatment in the prison system, such as men thrown into the "tanks." MacCormick found that in many instances drugs and liquor were smuggled in, and acts of sexual abuse were common. Among MacCormick's recommendations in his final report were "that the convicts be taken out of the tanks, that a proper combination of farming and industry be practiced, and that the sale of

prison goods be made so that the convicts could be paid a modest wage" (*Dallas Morning News*, 1947a; Texas Prison Board, 1947).

The prison population mushroomed following World War II. Governor Beauford H. Jester (1947–1949) faced the task to provide *minimum standards* of health and comfort as proposed by the MacCormick report. Governor Jester knew that he could do nothing to reform the penitentiary unless the legislature was willing to work with him on the budget. A reporter for the *Dallas Morning News* wrote, "Investigations may come and investigations may go, but the Texas Prison System will be bad until the Legislature gives it more money" (1947, as cited in Nowlin, 1962, p. 32).

A serious food shortage developed in the system in December 1947. Governor Jester, however, refused to call a special session of the legislature, commenting, "With all the land the prison system has available, I know it can raise enough beef to feed the prisoners. Why can't they?" (*Dallas Morning News*, 1947b). The grocery bill was paid indirectly, when Highway Commissioner Dewitt Greer allowed the Highway Department to pay $140,000 for steel that had been purchased by prison officials to make license plates.

The Prison Board began developing a plan to reorganize the prison system. They produced multiple recommendations. During their investigation they continued to find perversions and abuses within the system. These board members found that the tanks were cold and filthy, the men without underwear or medical attention, and the guards sometimes shooting indiscriminately inside of the tanks (Ellis, 1948). In a

speech in 1948 B. A. Stufflebeme, a member of the Texas Prison Board, described the "prison farms as being worse than the German concentration camps. He went on to describe that plowing on one farm was done by oxen until the farm got so hard up for meat that the oxen were eaten" (*Dallas Morning News*, 1948, cited in Crow, 1964, p. 297).

Ellis, Beto, and Estelle Era

The Texas Prison Board's response to the MacCormick report was to hire a new executive director to implement needed changes: O. B. Ellis, who had a national reputation as prison manager of the penal colony in Shelley County, Tennessee. Ellis remained director from 1947 to 1961. In some aspects Ellis made needed changes. He set out to improve the housing and living conditions for the inmates and guards. He reorganized and mechanized the agricultural operations. Farming expanded under Ellis' direction so that all meat and vegetables consumed were produced on the prison farms. Ellis developed a positive working relationship with the state legislature to enhance funding of the building projects and budget that he wanted to implement. As soon as the legislature thought that Ellis was making satisfactory improvements they returned to "the expectation of making the prison self-supporting" (*Dallas Morning News*, 1951, cited in Crow, 1964, p. 294). The title of an article in *The Progressive Farmer* (Scruggs, 1955) read, "Texas Prison Now Feeds Itself."

Ellis endorsed a program of segregation and classification that was adopted by the Texas Prison Board in 1935. The primary function of the Bureau of Classification

was to develop a complete file detailing information for each convict. This allowed for the separation of first-time offenders from "sex perverts and habitual criminals" (Crow, 1964, p. 321). This system brought about major changes in the methods of assignments, custody, and segregation of convicts (Texas Prison Board, 1935, p. 107). This segregation program had the additional benefit of providing for "special custody and supervision for the physically defective and the mentally ill" for the first time (Texas Prison Board, 1935, p. 138).

During the years that Commissioner Ellis was the prison administrator, the rules and definitions of punishment were modified several times. In 1943 a Special Disciplinary Committee was established to interview a prisoner before he was placed in isolation. Ellis (1950) believed that the "incorrigibles" should be locked up in individual cells and everything forgotten about except food. In 1950 the prison system again modified its rules for punishing convicts for violating prison regulations. The favored form of corporal punishment in this era was placing a guilty convict on a barrel or stool in one position for 2 hours at a time; he could then lie down for an hour, but must resume the standing position at the end of that time.

Solitary confinement now had three categories of severity. In the first category, while the convict was in isolation he had limited privileges such as tobacco, coffee, and tea. The second category allowed open cells with no privileges, three meals a day without tea or coffee, and a regular bed. The final category of isolation meant no bed, bread and water three times a day, the regular meal every 36 hours, and no tobacco privileges. Most of the isolation sentences were 30–60 days. Ellis

assembled an extensive security apparatus made up not only of guards but also of inmate snitches and building tenders, who regulated every convict movement, mediated disputes, and carried out informal physical punishments called "tune-ups" (Dilulio, 1987, p. 65).

In 1957 the Texas Department of Corrections (TDC) name was adopted. In 1961 Commissioner Ellis died. This was the end of an era in the life of the Texas prison system. The next commissioner was Dr. George Beto (1961–1972).

Beto had a management style that was well respected. He believed that a director must be in the field and not behind a desk to oversee the prison. Beto frequently showed up at prison units unannounced, always carrying his baseball bat. He would talk to the convicts, visit with staff, and eat the prison food. Beto, as Ellis, believed in education for the convicts and started the Windham School District. Beto is credited with other prison reform programs. In 1963 Beto convinced the Texas Legislature to enact a bill allowing the prison system to sell its agriculture and industrial products to other state agencies and nonprofit private organizations. Combining the income from the products sold and convict labor profit, Beto had been able to achieve the low convict costs per day. The Texas prison system under Beto was touted as a model for the rest of the country. Dissenters still assailed the prisons as Texas plantations and a modern system of slavery (Crouch & Marquardt, 1989).

W. J. Estelle (1972–1983) was the third director involved in changes in the prison system. The management style of these three directors was basically the same, they kept issues quiet, and the legislature and governors were quite pleased with their

performances. Improvements were made in some of the living conditions. Under Estelle's stewardship, the Texas prison system experienced growth in additional prison unit construction and the expansion of the prison industrial programs.

The most significant development during Estelle's tenure as director was the *Ruiz v. Estelle* federal lawsuit. Estelle had been accused of issues ranging from prison overcrowding to financial mismanagement and impropriety. The issue of cruel and unusual punishment continues to be a controversial issue today. Judge William Wayne Justice's opinion issued in 1980 was highly critical of the conditions within the prisons. The allegations against Estelle took their toll and he resigned in 1983. A witness for the plaintiffs called the Texas farms "probably the best example of slavery remaining in this country" (*Houston Chronicle*, 1978, p. 11).

The government of Texas has frequently changed its policy in the administration of its penal system over the years. Texas government officials and prison officials have had multiple investigations. Most often the main concern has been economics tied in with the politics of the day. The Texas prison system was for many years a pawn to be used by politicians. All of its officials and employees owed their position either directly or indirectly to the governor; governors used these positions to meet political obligations. The prison administration used the convict and his labor to give the state of Texas a fair monetary return. The Texas prison system thus has roots as a business organization. The Texas prison system has been used by governors, other politicians, and their associates for monetary benefit. Many of the problems that arise in connection with the operation of the prison system are business

problems, and the methods needed are business methods. This work cannot be done well if political influences and personal favoritism are unduly influential. Nevertheless, in spite of all this the administration of the Texas prison system is not merely a business problem. The aim of business is to make a profit, while the aim of the prison system should be to remake citizens. The human factor must also be given consideration by administrators.

There are two schools of thought about the function of a prison system. The first is that the prison system is merely a business proposition and exists for punishment of the inmates. The second is rehabilitation for the prisoners. Rehabilitation for the prisoners in the Texas prison system has not been the norm. The administrative policies of this system as well as legislative policy have promoted efficient and economical performance, but not rehabilitation. The arguments about rehabilitation versus punishment are ongoing.

In the 21st century, Texas prison conditions and policies are surprisingly unchanged, with the goals of prison self-sufficiency and profitability. History of the development of judicial power on state and national levels and an insight into the history of Texas prison development increase understanding of institutional change and reform of the TDCJ.

A Beginning Look at Ruiz v. Estelle

The Texas prison system was insular and secret until the 1970s when the federal court system "intruded" with *Ruiz v. Estelle*. Prior to the intrusion, the Texas

prison system remained out of the limelight. Ellis, Beto, and Estelle, skilled at public relations and dealing with the media, controlled information that came out of the prison and kept the legislature satisfied with cursory reports. However, with the lawsuit, *Ruiz v. Estelle,* abuses and illegal activities against prisoners began to be exposed. Judge Justice discovered, through the trial process, "an atmosphere of violence, brutality, and authoritarianism prevailed." Fear, intimidation, and the unscrupulous use of force were main control factors. Negotiations between the court and officials failed, and Judge Justice finally began the trial of *Ruiz v. Estelle* in 1978. The lengthy litigation was due in part to the antagonistic relationship between Justice and the state, with the resulting unprecedented resistance to changes mandated by the federal court. In 1980, Judge Justice found the Texas prison system unconstitutional. Prison officials and state legislators were shocked and angered by this ruling and denied all allegations.

In spite of the federal mandates of *Ruiz* and continued oversight by the federal court, the current Texas prison system conducts business much as it did 100 years ago. Many of the "units," as individual prisons are known, are run as large penal farms based on the old southern plantation model. On the farms, inmates grow or raise everything from hogs to jalapeños, working the fields under armed guards on horseback, trailed by a pack of hounds. Many observers have concluded that the TDCJ operates a "southern plantation" or "a neocolonial slave system" (Crouch & Marquart, 1989, p. 238).

The changes ordered by Judge Justice created an unparalleled upheaval in the TDCJ (Martin & Ekland-Olson, 1987). Additionally, as the TDCJ was implementing federally mandated changes, incurring great expense to the state, other factors surfaced that began contributing to the population increase and causing even further stress on the system. The "War on Drugs" and "tough on crime" political policies harshly impacted the system. At the same time, the public was experiencing a moral panic about crime, fueled by politicians who cited drugs and crime as greater social problems than poverty and unemployment, seeking votes. The public reacted by supporting bonds to build more prisons to house prisoners sentenced to increasingly longer sentences. However, in a 2004 interview, Judge Justice stated that he never ordered TDCJ to construct more prisons; in fact, he wanted many nonviolent offenders released. The motivation to construct more prisons seems to have been for profits for companies such as H. B. Zachery. These factors led to the incarceration of thousands of nonviolent offenders into an already overcrowded prison system (Tonry & Petersilia, 1999).

Ruiz and Prison Health Care

Health Care and Medical Services in Prisons

Americans pay more for health insurance than any other country. Americans also pay more per capita for health care than any other country. Health insurance has become too expensive for a majority of people in the United States to be able to

maintain a policy. This impacts health care in prisons as well. People confined in prison commonly enter in poor health, which stresses the system even more. The health care system in prisons is one tentacle of the larger prison industrial complex. Recent lawsuits have attempted to make substantial changes in prison medical services, which, like prisons in general, are closed, secretive systems where communication is contradictory or nonexistent. There have been some alterations, but the system remains closed. Moreover, health care in Texas prisons continues to be on the margins of unconstitutional.

Courts have deliberated regarding adequate mental and physical health care for inmates. Courts have long held that policies denying an inmate's basic physical and mental health needs constitute cruel and unusual punishment. Further, courts have held that the denial of adequate mental health care also constitutes a violation of the inmate's Eighth Amendment rights. Plaintiffs who bring suit against a prison for violating an inmate's Eighth Amendment rights, due to lack of medical care, rely on Title 42, Section 1983 of the U.S. Code.

Title 42, Section 1983 of the U.S. Code

Section 1983 is the general provision that allows individuals to sue government entities for constitutional violations. Plaintiffs must show that this failure resulted in substantial harm to the inmate. In 1976, the Supreme Court acknowledged that the concept of cruel and unusual punishment must comply with society's *evolving standards of decency* in the treatment of inmates. The Court reasoned that

when inmates are incarcerated they must rely on prison personnel for their medical needs. The Court held that any course of action or failure to act that undermines the inmate's personal dignity or causes the inmate undue suffering constitutes cruel and unusual punishment.

Lower courts have recognized that the constitutional duty to provide adequate medical health care necessarily includes the duty to provide adequate mental health care including assessments and treatments. These courts have reasoned that the denial of mental health care may also cause undue suffering in violation of the Eighth Amendment.

Plaintiffs must satisfy three requirements to bring successful Section 1983 actions.

1. The first element of a Section 1983 claim requires plaintiffs to sue only "persons" or governmental institutions for constitutional deprivations.

2. Plaintiffs must prove that the defendant was acting under the authority of state law when the constitutional violation occurred.

3. The third element requires plaintiffs to prove that the inmate suffered a constitutional violation. The Supreme Court recognizes that a violation of an inmate's Eighth Amendment rights is sufficient to bring a Section 1983 claim.

Eighth Amendment "Deliberate Indifference"

To prove that the prison violated the Eighth Amendment through *deliberate indifference,* plaintiffs must demonstrate that the prison was deliberately indifferent to

the inmate's serious medical and/or mental health needs. This standard has two requirements. First, plaintiffs must prove that the inmate's medical need was sufficiently serious. Second, plaintiffs must prove that personnel knew, or should have known, about the inmate's serious medical need, but failed to address it. A policy is also unconstitutional if it fails to provide adequate mental health care to an inmate. However, courts have failed to agree upon precise standards for what constitutes "adequate" mental health care. As a result, cases involving nearly seemingly analogous facts may result in contradictory outcomes.

Plaintiffs may also satisfy the first requirement by demonstrating that the inmate possesses a serious mental health need in a variety of ways. For example, doctors, family members, or the inmates themselves may notify personnel that the inmate has a diagnosed mental illness. Therefore, courts should allow juries to presume seriousness when a physician has diagnosed the inmate with a serious mental illness. In addition, circuit courts have held that a demonstrated susceptibility to suicide, such as a prior suicide attempt, indicates a serious mental illness.

Courts may infer deliberate indifference when the likelihood of the constitutional violation is "sufficiently obvious." Courts presume that the prison personnel must have known the policy was unconstitutional, but failed to revise the policy. However, a prison may counter evidence of deliberate indifference by showing the absence of a direct causal link between its policy and the violation.

Novack case. In *Novack*, health personnel in the prison could have presumed that Novack's mental health need, as evidenced by a prior diagnosis and treatment,

was sufficiently serious to present a genuine issue of material fact. Prior to Novack's incarceration, a physician had diagnosed him with paranoid schizophrenia and prescribed medication to treat the mental illness. In addition, both Novack's mother and physician had informed personnel that Novack suffered from schizophrenia. Therefore, the prison could have presumed that Novack's mental health need was sufficiently serious. Accordingly, a genuine issue of material fact existed regarding the seriousness of Novack's mental health need.

Juries and prison personnel also may presume that a mental health need is serious based on its obviousness to a reasonable person. Courts routinely permit such presumptions in the medical context, reasoning that mental illness may manifest itself physically, thereby allowing a reasonable person to perceive the need for treatment, for instance, inmates who manifest bizarre and self-destructive behavior. For this reason, prison health care staff may presume a serious mental health need when presented evidence that the inmate previously attempted suicide.

Cills case. In *Cills*, for example, the decedent actually had attempted suicide prior to his ultimately successful attempt. In fact, Cills attempted suicide while in custody just weeks prior to his death. Therefore, any reasonable person could perceive that Cills' suicidal tendency constituted a serious mental health need. Accordingly, Cills' serious mental health need constituted a genuine issue of material fact regarding the policy's constitutionality and was presented in this light to the court (Currie, 1998).

The obviousness component. Some courts may distinguish mental illness from medical illness because mental illness is more difficult for a layperson to detect. In addition, qualified mental health professionals frequently disagree on the diagnosis of a mental illness. Therefore, courts may conclude that a prison is not deliberately indifferent to an inmate's serious mental health need because that need is not sufficiently obvious. Accordingly, courts may grant summary judgment to the defendant because the plaintiff failed to present a genuine issue of material fact.

Other litigation has resulted in rulings that prisons and jails must provide mental health screening at intake to identify serious problems, including potential suicides (*Balla v. Idaho Board of Corrections,* 1984). Additionally, there must be some means of separating severely mentally ill inmates from the mentally healthy. Mixing mentally ill inmates with those who are not mentally ill may violate the rights of both groups. Finally, failure to provide treatment for mentally retarded inmates also may violate the constitution, if regression occurs (Ellis & Luckasson, 1985, as cited in Kelly, 2000; National Commission on Correctional Health Care [NCCHC], 2003a, 2003b).

Prevention of Undue Suffering

The distinctions between the nature of medical and mental illness do not warrant their disparate treatment by courts. The rationale behind the standard of deliberate indifference to serious medical need, the *prevention of undue suffering*, also applies in the mental health context. However, courts have issued varying

decisions. Some courts have stated that the provision of mental health evaluations is not mandatory under the Eighth Amendment. They reasoned that prisons are not required to provide the most progressive, humane mental health care available (Currie, 1998).

Nevertheless, the prevention of undue suffering is mandatory, not merely desirable, under the Eighth Amendment. The rationale behind the Eighth Amendment, the prevention of undue suffering, justifies extending inmates' rights to include treatment for serious mental illness. The Supreme Court has held that the Eighth Amendment must continually evolve to encompass societal norms of decency. For example, courts did not recognize that the denial of medical care constituted an Eighth Amendment violation until 1976. At that time, the Supreme Court declared that evolving standards of decency required prisons to provide adequate medical care. These *evolving standards* must now encompass mental illness. Therefore, courts should hold that the denial of professional mental health evaluations is a material fact in the determination of a policy's constitutionality; this is rarely implemented.

Is Prison Health Care Adequate?

The words "health care" do not appear in the Constitution; therefore, is health care a right? At present, U.S. citizens must appeal to the political will of federal and state elected officials to provide adequate programs. But they have failed to do so. The current "states' rights" health care system is structured to be separate and unequal. Over 1,000 health care plans, each with varying services, products, and

quality, are spread across 50 states, 3,067 counties, and tens of thousands of cities. How does the federal or state government legally guarantee health care of equal high quality to every citizen?

> Dr. Ingrey-Senn (1982) published an article in *World Medicine,* writing,
>
> Perverted medicine. The practice of medicine in prisons is being perverted for reasons of political expediency….The system is one which enables bad doctors, incompetent and maybe worse, to practice without controls or scrutiny….Men and women in our prisons are receiving what amounts to punitive medicine. (p. 7)

The poor conditions in the medical units in prisons continue through political and economic inertia. Two issues that affect medical units—or are used to explain abuse—are security of the prison and maintaining control of the prisoners.

The recorded history of medical care in prisons until the late 1960s was limited to written accounts by inmates, which are rare but graphic. For example, Thomas Murton, the superintendent of an Arkansas prison, reported that a convict "doctor" lacking medical or nursing training was responsible for most of the primary care at the Tucker Prison arm. This person not only ran an illegal drug program and sold medical leaves of absence, but also tortured prisoners by means of hand-cranked electric generators (Murton & Hyams, 1969, cited in Tonry & Petersilia, 1999*).* This Arkansas prison was the subject of a series of lawsuits in the 1960s, including the landmark case *Holt v. Sarver* (1969). Studies by the U.S. General Accounting Office in the 1970s found that prison health care facilities were frequently old, small, dark, crowded, noisy, and lacking modern or sufficiently technical equipment and supplies (U.S. General Accounting Office, 1978, 1981).

The Arkansas situation mirrored that in Texas. A U.S. Supreme Court decision in 1972 regarding Alabama's prisons found that prisoners without formal medical training extracted teeth, dispensed drugs, operated x-ray equipment, and performed minor surgery. Medical services were found to be withheld by prison staff for purposes of disciplining inmates. One quadriplegic in the hospital unit received no intravenous feeding during the 3 days preceding his death; another epileptic prisoner died for lack of medical supervision, despite requesting treatment. Hospital facilities had no full-time medical staff and no nursing coverage on weekends or nights, even if patients were critically ill. Medical supplies were in short supply, and few trained medical personnel were either employed or available to prisoners. The court characterized these conditions as "barbarous" and found the prisons to be in violation of the Eighth Amendment's prohibition of "cruel and unusual punishment" (*Newman v. Alabama,* 1972). In the Texas prison system medical care was administered by inmates who performed surgery on other inmates (Martin & Ekland-Olson, 1987).

Deficient care was not restricted to the southern United States. A 1972 study of medical care in Pennsylvania's prisons by the University of Pennsylvania Law School's Health Law Project (1972) identified a number of deficiencies. Newly committed prisoners were given only cursory medical examinations, with no provision for ongoing medical surveillance. Access to "sick call," the only point of entry to medical care, was often barred by guards who lacked training in medical triage. Special diets were virtually nonexistent; diabetics were told to select their food from regular meals, without instructions or assistance. Provisions for psychiatric

services were grossly inadequate. For example, prisoners who tried to hang themselves were simply cut down, given medication, and returned to their cells without psychiatric evaluations. Rudimentary quality controls, such as medical audits, were lacking.

During the late 1960s, the federal courts began searching for standards based on the U.S. Constitution to aid in the rulings about the prisons. Early decisions focused on "gross" and "shocking" deprivation of basic hygiene in correctional facilities, in large part because the Eighth Amendment was interpreted by the courts as proscribing against torture and other barbarous physical punishments, as in *Holt v. Sarver* (1969). In *Holt v. Sarver*, the court established a test of what constituted unconstitutional care in a challenge to conditions and practices throughout the entire Arkansas state, including medical and dental care:

> Generally speaking the punishment that amounts to torture, or that is grossly imposed, or is inherently unfair, or that is unnecessarily degrading, or that is shocking or disgusting to people of reasonable sensitivity is 'cruel and unusual' punishment. And a punishment that is not inherently cruel and unusual may become so by reason of the manner in which it is inflicted. (McDonald, 1999, cited by Tonry & Petersilia, 1999, p. 435)

Presented with cases alleging appallingly unhygienic conditions and inadequate health care services in prisons, the federal courts began in the late 1960s to accept cases and to rule in favor of prisoners' claims. Prior to this, the courts had deferred to the expertise of correctional administrators and the "hands-off" doctrine. Within a few years, the courts established and defined prisoners' constitutional rights to adequate health care, with the continual problem of defining "adequate" or

"minimal." Prison administrators responded by improving procedures and facilities for care, although some of the structural obstacles to providing medical care have persisted.

Texas was not faced with these issues until the lawsuit in 1976, *Estelle v. Gamble*. In this lawsuit the U.S. Supreme Court took the opportunity to refine constitutional principles governing states' obligation to provide medical care to prisoners. *Gamble* would go beyond the ruling in Arkansas in *Holt v. Saver*. Gamble, an inmate in a Texas prison who was injured on a work assignment, alleged that he was not cared for adequately and that the custodial staff interfered with his care. The court concluded that "deliberate indifference" to serious medical needs of prisoners constitutes the "unnecessary and wanton affliction of pain" proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors' response to the prisoner's needs or by prison guards' intentional denial, delay, or interference with treatment.

In *Estelle v. Gamble* (1976), the court did not rule in the plaintiff's favor, as the plaintiff had not alleged that he was denied treatment, but rather that the treatment was inadequate. To the court, this appeared as a malpractice claim rather than a valid federal claim of medical mistreatment. The courts have deliberated on the constitutional issue in arguments about whether the medical provider's professional judgments or techniques were appropriate; opinions depend on the judge. *Estelle v. Gamble* was revisited by Judge Justice in the *Ruiz* trial. Judge Johnson ruled in Alabama that repeated examples of negligent acts may be deemed as deliberate

indifference, including delay or denial of access to medical attention, denial of access to medical personnel qualified to exercise professional judgment about a medical problem, and failure to carry out medical orders (*Estelle v. Gamble*).

Later rulings such as *Newman v. Alabama* (1972) established that because prisoners cannot obtain their own medical services, the Constitution obligates correctional authorities to provide prisoners with "reasonably adequate" medical care. In *Tillery v. Owens* (1989), "adequate" services were defined as those affording "a level of health services reasonably designed to meet routine and emergency medical, dental and psychological or psychiatric care" (p. 1,301).

Doctors, Psychiatrists, and Administrative Segregation

Prisoners are to be provided with adequate medical and mental health care. However, under current state budgets and attitudes, psychiatrists can rarely provide more than an occasional consultation when a crisis occurs. Time constraints and a lack of desire by officials eliminate preventive medicine. Many inmates request appointments, but it takes months before an inmate can be seen, and most are not seen at all unless a crisis arises. Inmates with psychiatric needs that are not adequately treated tend to become worse. This in turn leads to the housing, or warehousing, of many inmates in administrative segregation, or isolation.

The mentally ill largely have been ignored by society in general as well as by correctional facilities across the United States. In fact, once the mentally ill are behind bars, experts say, they stand little chance of recovering (Teplin, 1984, 1986).

Most jails and prisons do not provide adequate mental health services. Torrey (1997) found in his studies that large proportions of prisoners suffering from serious mental disorders are not assessed and therefore do not receive treatment. Correct diagnosis, treatment, and prescriptions get lost in the shuffle (Torrey). Further, there may be little motivation to diagnose a prisoner with a mental illness or chronic physical illness when such action results in greater costs to the prison system and more trouble in the units by the guards.

As the reader may recall, the first real mention of administration segregation was by the Puritans. The isolation and solitude method, as previously noted, was used in the first prisons, in Pennsylvania at the Walnut Street Prison and in New York, at the Auburn Prison. However, these methods of isolation and silence caused mental illness and were thus abandoned. Yet, in many prisons today, the mentally ill are placed in administrative segregation, a sort of isolation. According to Kupers (1999), "Administrative segregation conditions can either massively exacerbate a previous psychiatric illness or precipitate psychiatric symptoms….isolation, sensory deprivation, resulting mental illness" (p. 97).

Judge Justice (1999) described the administrative segregation units in Texas as "virtual incubators of psychoses," adding, "they inflicted such cruel and unusual punishment that confinement in them violated the Constitution." When asked how Texas' administration segregation units were worse than others around the country, Dr. Haney responded,

> The bedlam which ensued each time I walked out into one of those units, the number of people who were screaming, who were begging for help, for attention, the number of people who appeared to be disturbed, the existence, again, of people who were smeared with feces, the intensity of the noise as people began to shout and ask, Please come over here. Please talk to me. Please help me. It was shattering. And as I discussed this atmosphere with the people who worked here, I was told that this was an everyday occurrence, that there was nothing at all unusual about what I was seeing. (*Ruiz v. Johnson*, 1999)

Dr. Jurczak also explained that, in his expert opinion, Texas's administrative segregation system harmed mentally ill inmates. Such inmates, he said, need contact and social stimuli. More generally, Dr. Jurczak testified that the administration segregation system is destructive to all its occupants (*Ruiz v. Johnson*, 1999).

Medical doctors, as well as psychiatrists, work behind high walls and are usually neither seen nor heard. It becomes difficult for those that are employed behind the walls to strive for high-quality health care even for legal and/or humanitarian reasons. The literature review reveals that the prison medical service in the TDCJ is deficient due to its organization, invisibility, and lack of accountability. Furthermore, guards and officers may impede or delay care. For example, one large issue is that when a prisoner wants to go to a medical clinic, he or she must put in the request with the guard on duty. For whatever reason, that guard might just throw the request into the trash. A prisoner who has a headache cannot take an aspirin without seeing a prisoner officer. Prisoners need to have adequate access to good medical care. To reduce the recidivism rate, a good place to begin social changes would be in the prison medical care system.

Health Care Costs and Health Care Management Organizations (HMOs)

Improving health care provision in the nation's prisons has come at a financial cost. Spending for the health care of prisoners has been increasing rapidly, as in the general population. Thus, correctional administrators have become interested in managed care strategies. Managed care reforms were developed for the purpose of restructuring health care delivery as a cost-containment procedure to save money. Texas prisons have contracted with the University of Texas and Texas Tech. The contract has proven to be controversial.

There are a number of difficulties in recruiting well-trained physicians, including prisons' remote locations and generally unappealing conditions, the absence of formally organized health care systems distinct from other functional divisions, inadequate facilities, inadequate medical record-keeping systems, pay, and low-status stigma. Medical professionals have not exactly rushed to serve the prisoners. Recruiting physicians trained in specialties has been particularly difficult. One alternative to bringing specialists into the prisons is to take the prisoners to them, such as The University of Texas Medical Branch (UTMB) at Galveston and Texas Tech. As a health care management organization (HMO), UTMB (2003) receives more than a "quarter-billion dollars a year" for TDCJ prisoners. Additionally, UTMB is installing telehealth computer facilities to allow inmates to talk to doctors without the expense of travel.

However, Mike Ward and Bill Bishop of the *Austin American-Statesman* reported in a series entitled "Sick in Secret: The Hidden World of Prison Health

Care" December 16–21, 2001, that changes needed to be made. Will Harrell, Executive Director of the Texas ACLU, said that the TDCJ needs oversight accountability because "history has shown that men and women behind bars do not fare well when Texas is left to its own devices" ("Bottom Line," 2003).

What issues and questions have arisen under these HMOs? Is the prison system facing future prisoner litigation if they are not allowing for these medications and adequate health care as dictated by the HMO? It may turn out to be a question of defining what is "medically necessary." HMOs do involve the Texas political process, especially since they have promised to supply the medical services for less money than the prison system can.

Judge Justice asked the Department of Justice in 2002 to maintain federal oversight of the TDCJ for 2years. When the Justice Department was contacted, they responded that (a) they had no record of being asked by the Court to oversee the TDCJ, and (b) they could not find any reports on the matter. In 2002 Justice was still concerned about the mentally ill and their treatment while in administrative segregation. Judge Justice wrote in his Opinion issued June 2002 in *Ruiz v. Johnson***,**

> Inmates are still victims of an unconstitutional system and the conditions of confinement in administrative segregation are unacceptable, the failure to provide reasonable safety to inmates against assault and abuse, and the excessive use of force by correctional officers in Texas prisons. (p. 3)

Adding to the prison health care cost is the increasing number of older persons in prison. This is partly a reflection of increasing age of the U.S. population at large and also a consequence of the passage of mandatory minimum sentencing laws and

"three strikes" laws. The "get tough on crime policies" translate to longer sentences and less parole. This lends itself to what is now referred to as "the graying of the prison system." The heavier burden of HIV/AIDS, tuberculosis, and other infectious diseases in inmate populations also puts powerful pressures on prison budgets. Treatments for HIV are becoming more costly, with the latest combination therapies costing $600–900 per month per prisoner (NCCHC, 2002).

Additionally, a request was made in 2001 that several issues be examined by the House Criminal Jurisprudence Committee (Chairman Juan Hinojosa) and the Senate Criminal Justice Committee (Chairman Armbruister). Among the issues was to "monitor efforts to increase the availability and effectiveness of state and local mental health services for adult and juvenile offenders, and recommend improvements where applicable" (Senate Criminal Justice Committee, 2002).

The struggle to change Texas' traditional prison culture began in 1980 when Judge Justice declared the system unconstitutional. The historical review of years of prison issues indicates the eventual and inevitable citing of unconstitutional violations. The TDCJ officials believed that as long as the prison units were clean, and the numbers of escapes low, the prisons were operating properly.

Judge Justice was aware of the potential struggle that was about to take place in this traditional isolated prison culture. However, in a 2004 interview he stated that he did not anticipate the massive resistance and refusal. There would be questions surrounding resistance, secrecy, and resolution.

The extreme resistance, along with other factors, required dramatic actions by the judge to compel the state to comply with the federal court mandates. How do institutional change and institutional equilibrium affect policies? One viewpoint is that as organizations age, members shift their primary loyalty from promoting its goals/mission to maintaining its social structure (defending their turf). Consequently, any change that threatens to disrupt the well-defined informal structures of custodial institutions very likely will encounter great resistance, and coercive strategies of change alone may not achieve satisfactory results. This issue may be surfacing as part of the conflict between the TDCJ and the judge, as the TDCJ officials, the legislature, and governors refused to implement mandated changes.

Two possible explanations for their resistance and refusal are (a) they simply do not agree with the proposed changes ordered by the court, and (b) they object to the amount of state funds that may be required (Austin, 2002). A strategy of change must address the external as well as the internal constraints imposed by the environment. Therefore, the design and implementation of effective program policy requires the continuous study of the behavior of organizations.

Slaves of the State

Until the 1960s the prevailing view was that on becoming prisoners criminals forfeited almost all their rights. A prisoner was a "slave of the state" (*Ruffin v. Commonwealth* 1871). The courts adopted what became known as the "hands-off" doctrine. Prison conditions and decisions were said not to be susceptible to judicial

scrutiny. The courts' refusal to interfere with the administration of prisons meant that prisoners' constitutional rights were neither interpreted nor enforced.

Texas prisons have not changed substantially in 100 years. Many are run essentially as large penal plantations. Many contend that prisoners owe their labor to the state as partial payment for their support. In particular, the image of a prisoner as slave of the state placed convicted felons outside the boundaries of community life, thus secretly allowing the infliction of suffering. Whippings and other forms of corporal punishment were and are routine. The frequency of illegal lynchings, a phenomenon found disproportionately in the South, rose and fell, often in concert with the rhythms of local economic and political life, when the boundaries separating insiders from outsiders became most prominent. In December of 1865, with the ratification of the antislavery amendment and its loophole clause that slavery was henceforth illegal "except as punishment of crime," the United States joined the more distant Aztec, Chinese, and Egyptian civilizations in which the dominant image of the slave "was that of an insider who had fallen, one who ceased to belong and had been expelled from normal participation in the community because of a failure to meet certain minimal legal or socioeconomic norms of behavior" (Rothman, 1971, p. 102).

Texas prisons are closed institutions. Prison and state officials have kept the Texas prison system, and its problems, relatively secret. The culture of a closed institution, such as a prison, is marked by an amalgam of complex organizational characteristics that stands or falls on its semblance of truth. Prison populations do not constitute a credible interest group. They are not consulted by or represented within

management. In the last analysis, the control exercised over them is bluntly coercive, and considerations of control and security dictate a great decree of secrecy in their operation. Mundane aspects of life, such as access to lawyers or relatives, communication in general, and a whole range of issues from sanitation to sexual activity, are subject to detailed regulation by prison staff.

In the early days of state prisons, a hunger for profits drove management to supply cheap prison labor to outside contractors, which led to abuses. Essentially, the state sold inmate labor to the highest bidder as commodities. The lease system continues, again under a different label; from Dell Computers to the National Rifle Association (NRA) to Victoria's Secret, businesses profit from prison labor with the blessing of the state.

One example of the operation of the TDCJ is the behavior of the NRA as it benefits from new business opportunities involving prisons. An important and largely overlooked force in driving the prison boom in the United States was/is the NRA. In an attempt to change its image from pro-gun to anticrime, the NRA formed CrimeStrike in 1991 as a division of its lobbying arm, the Institute for Legislative Action. CrimeStrike has lobbied for longer prison sentences and new prisons. It has served as a front group for the many constituencies that profit from an expanded crime-control and prison industries (Owens, 2003). In Texas in 1993 the NRA lobbied for billion-dollar bond initiatives to fund prison construction. The NRA-backed pubic ad campaign in Texas can arguably be credited with the construction of an additional 76,000 prison beds in 2 years. At the federal level, the NRA lobbied

hard for the 1994 crime bill, which increased the federal funds available to states for building new prisons from $3 billion to $10 billion. Today, the NRA lobbies for privatization of prisons. The NRA's embrace of "get tough on crime" rhetoric has paid off and become a lucrative business opportunity.

Additionally, private prison operators have profited from the prison building boom. Private prison companies that are listed on the New York Stock Exchange have profited. Small towns that were in need of jobs for their citizens have benefited. Additionally, counties have profited from taxes the private prisons sometimes pay. The Karnes County government gets $.25 per day per prisoner, for a total of about $26,000 last year (Owens, 2003).

Other businesses have profited by reducing their labor costs. Companies that want to pay lower labor costs, such as Chatleff Controls and Lockhart Technologies (LTI) in Lockhart, Texas, have seen the cash opportunities in hiring prison labor. LTI laid off 150 workers in Austin to utilize the cheap prison labor. LTI does not have to provide benefits or vacations to prison inmates. LTI's president stated "that he enjoys a captive work force. They're here every day. Their cars don't break down, they're rarely ill, and they don't have family problems. They're delightful to work with" (Owens, 2003, p. 4).

Some of Wall Street's largest investment houses, such as Goldman Sachs & Co. and Smith Barney, compete to underwrite the bonds for prisons. Other companies have invested in private prisons, such as American Express. One of the clearest examples of the political economy at work in the Texas prison system is the health

care system and the current contracts with UTMB and Texas Tech University. By building so many prisons so fast, a climate has been created in which it is now in businesses' interests to lobby for prison terms that are longer, tougher, and harsher. In this way the prison boom can perpetuate itself; the beds must stay full for there to be a good return on one's investment.

Social, political, and economic environments can have a devastating effect on institutions such as a prison. Declines in the economy can leave a prison organization with less operating capital than in times when the tax base was wider and stronger. Conservative crime control policies can lead to increases in the number of offenders sent to prison as well as the amount of time a felon can expect to serve in prison. Longer sentences increase the prison population.

Conclusion

This study enables analysis of the dynamics of structure and change within the TDCJ both organizational and policy change. The policymaker must be struck by the powerful effect ideology can assert on the operation of institutions and by its constraining effects on reform.

Power is critical in the analysis of organizational and policy change, especially the transfer of power. Of particular interest are those key decisions and processes that result in redistribution or transfer of power. Transfers of power are important both as culminations of change processes and as forerunners of new directions of possible changes. Similarly, the outcomes of these processes may result

in new mandates for organizational change. These critical processes within organizations must not be ignored.

In summary, this study examined the historical interplay of political processes and structures with economic processes and structures. The polity is an organization's power system—the systematic manner in which power, influence, and authority are distributed, mobilized, utilized, and limited. Power is utilized to achieve or to maintain a set of goals, attitudes, and values.

This study is a retrospective historical analysis of the *Ruiz v. Estelle* lawsuit that mandated many changes within the Texas prison system and led to the development of prison policy. A particular set of events are described to discover common patterns that occurred and give insight for future policy formulation.

Chapter 4

Findings

Introduction

This study is a retrospective historical analysis to identify and describe the multiple historical factors that influenced the policy direction of the Texas prison system. This is a process of shifting through a body of data and searching for patterns and relationships in order to gain insights about the phenomena of the data described. In essence, this process is based on a survey of available and accessible literature, which then requires a synthesis of the information sources to explain policies. This process is a matter of putting the pieces of the puzzle together.

This study was guided by the following questions:

1. What factors are involved in the determination of whether the TDCJ met the necessary minimum constitutional standards in prisoner health care, determined by the court, to be a constitutional prison?
2. What does the postlitigation health care system look like in Texas, and is it really different from the prelitigation system? Did this federal court intervention make recognizable changes in the organization, structure, or policies of the health care system in Texas prisons?
3. What were the goals established by the court to achieve change?
4. What factors act as barriers to the change process? The court assumes that its orders will be followed and thus will result in change within key areas

of the health care delivery system and the policies that govern it within the TDCJ. Otherwise, there would be a serious breakdown in the justice system. The extent to which this assumption is valid was explored in this study via the following subquestions:

(4a) To what extent, if any, does the resistance to change from various parties act as a barrier to the change process?

(4b) To what extent, if any, does the resistance to change originate from historic issues of federalism and states' rights?

(4c) To what extent, if any, does the resistance to change stem from the location of the Texas prison system in a southern state, which was, and is, operated on the plantation model?

(4d) To what extent, if any, is the resistance to change rooted in the history of slavery in this southern state?

5. What factors acted to facilitate the implementation of the mandated changes? This question has four subquestions:

(5a) Are political factors involved in the success or failure of the court-imposed changes?

(5b) Are economic factors involved in the court-imposed changes?

(5c) If prisons are big business, is this a factor in the court-imposed changes?

(5d) Do prisoners become commodities within the system, and is this a factor in the court-imposed changes?

6. What is the "life expectancy" of changes that ultimately occur after federal oversight ends?

Research Question 1 Findings: Unconstitutional Prison Health Care

Research Question 1 asked what factors are involved in the determination of whether the TDCJ met the necessary minimum constitutional standards in prisoner health care, determined by the court, to be a constitutional prison. The literature review revealed the impact of historical litigation in this determination.

After *Brown,* many disadvantaged individuals and groups were extended the same rights and protections that were supposed to be granted to all citizens. Most importantly, the Supreme Court ruled that the Civil Rights Act of 1964 did protect the rights of convicts in state prisons. Thus, in 1972 David Ruiz, an inmate in a Texas prison, filed a petition in federal court accusing the TDCJ of violating a number of his civil rights. Ruiz sought declaratory and injunctive relief under Title 42 Section 1983 of the Civil Rights Act of 1871. Ruiz claimed that prison staff illegally beat and intimidated inmates with the knowledge and the blessing of the Texas prison administration. Ruiz specifically referenced rights protected under the Eighth Amendment, "cruel and unusual punishment" that was transferred to the states via the Fourteenth Amendment. After the *Ruiz* petition was filed in 1974 Justice consolidated the *Ruiz* lawsuit with other petitions to convert the suit into a major prison reform class-action lawsuit.

The U.S. Supreme Court issued a specific ruling on all inmates' constitutional rights to medical care: There existed in Texas prisons a "deliberate indifference" by prison officials and personnel (physicians, corrections officers, and others) towards the serious medical needs of inmates that constitutes cruel and unusual punishment and, thus, is a violation of the Eighth Amendment. The Court delineated that a prisoner does not lose the constitutional rights protected by the due-process clause of the Fifth and Fourteenth Amendments and by the Eighth Amendment, which bans cruel and unusual punishment. Therefore, the "deliberate indifference" standard articulated by the Supreme Court in 1976 in this landmark case of *Estelle v. Gamble* further defined the extent of this legal standard.

An excerpt from the Judge's Memorandum:

> It is impossible for a written opinion to convey the pernicious conditions and the pain and degradation which ordinary inmates suffer within TDC prison walls—the gruesome experiences of youthful first offenders forcibly raped; the cruel and unjustifiable fears of inmates, wondering when they will be called upon to defend themselves against the next violent assault; the sheer misery, the discomfort, the wholesale loss of privacy for prisoners housed one, two, or three others in a forty-five-square-foot cell or suffocatingly packed together in a crowded dormitory; the psychological suffering and wretched physical steeds which must be endured by those sick or injured who cannot obtain adequate medical care; the sense of abject helplessness felt by inmates arbitrarily sent to solitary confinement or administrative segregation without proper opportunity to defend themselves or to argue their causes; the bitter frustration of inmates prevented from petitioning the courts and other governmental authorities for relief from perceived injustices. (*Ruiz v. Estelle,* 1980, p. 1391)

Judge Justice issued a sweeping opinion against the state of Texas that found the "totality of conditions" in its prison system to be in violation of the U.S. Constitution

in six major areas: (a) overcrowding, (b) security, (c) fire safety, (d) medical care, (e) discipline, and (f) access to the courts.

Research Question 2 Findings: Current Health Care in Texas Prisons

What does the postlitigation health care system look like in Texas, and is it really different from the prelitigation system? Did this federal court intervention make recognizable changes in the organization, structure, or policies of the health care system in Texas prisons?

Many inmates enter prison in extremely poor health, due to factors such as poverty, drug abuse, and mental illness. Ruiz's suit proposed that inmates should not leave the prison system in a worse physical or mental condition than when they entered, if the cause of a change in health condition was the inadequacy of the prison health care system.

Conditions threatening the health and safety of inmates continue to plague TDCJ. The pressures of increasing population and limited budgets continue to account for a significant portion of recent deterioration of conditions in the prison system. Overcrowding threatens to overwhelm the capacity of the correctional system to maintain minimally adequate living conditions. The fiscal crisis currently facing the state has undermined the progress made toward achieving and maintaining minimally adequate conditions—even adequate supplies of toilet paper. A 2003 article in *The Huntsville Item* reported,

> With the state of Texas facing a $9.9 billion budget shortfall, the Texas Department of Criminal Justice has been forced to undertake a number of cuts in many areas. The first of those cuts have hit home for the inmate population, as inmates now are being supplied with a roll of toilet paper once every two weeks as opposed to one roll per week. (Passwaters, 2003, para. 1)

Many articles have been written recently about the conditions in TDCJ, especially health care. Ward and Bishop (2001a, 2002b, 2002c, 2002d; see also 2002a, 2002b, 2002c, 2002d, 2003) wrote a series in the *Austin American-Statesman* describing the poor conditions. Many readers believed that these problems had been remedied with the Court's mandates and were surprised to learn differently.

Texas prisons, filled to near-maximum capacity for years, risk overflow in direct violation of the mandates from the *Ruiz* lawsuit. The state may run out of space for new prison inmates by March of 2005, according to two reports issued by the Texas Legislative Budget Board. The Texas inmate population figure has been within 1.1% of maximum operating capacity since October 2002. Prison administrators prefer to refer to an occupancy level of 97.5%. Projections in the report indicate that prisons will be overpopulated by 842 inmates by the end of the year 2005 and populations will increase steadily to an extra 14,490 by 2010, a number 9.6% beyond the maximum capacity. Mike Viesca, spokesman for the Texas Department of Criminal Justice, said emergency appropriations requests have been sent to the legislature for approval. So what has changed?

After a long and painful litigation process violations continue and many reformers are concerned that TDCJ will gradually slip back into the old ways of doing things if not carefully monitored. Many wanted Judge Justice to maintain federal

oversight over the prison system. There are indications that TDCJ staff still employs illicit force and that the administration is less than diligent in trying to eliminate these occurrences. The mentally ill are still placed in administrative segregation, which particularly concerned Judge Justice. Abuse, indifference, and injury still occur, tempering the results of litigated prison reform.

Hallinan (2001) in his book, *Going up the River,* described current conditions:

> In Texas prisons they still do things much as they have for a hundred years. Many of the "units" as the prisons here are known, are run as large penal farms….The crops are tended by inmates, who work the fields under armed guards on horseback, trailed by a pack of hounds (in case a convict tries to escape). The field bosses wear pistols and one has a rifle. Almost no place in America still treats inmates like this, and I had wanted to see this piece of living history before I died. (p. 3)

Moreover, around 1996 prisoners at the Stiles Unit began filing large numbers of complaints about medical care at the facility. Many of the system's sickest inmates were housed at Stiles. Prison officials soon learned that inmates were receiving wretched health care—and they were dying. In the fall of 1996, prison system administrators decided to check up on the care provided by the UTMB in Galveston to inmates at the Stiles Unit. Prison system doctors had been relegated to administrative functions; they took notice and began an emergency audit of the medical charts of the inmates who had died that year. Chart reviews are one way to monitor the quality of medical care. In Texas, the state's chart reviews of deceased inmates are secret by law—but events in 1996 were an exception. The doctors reviewed 24 charts and concluded that 16 dead inmates had received improper care. Two-thirds had received "improper" medical care. Some died in horrific conditions.

One man starved in the prison infirmary, and another died a few days after he was found covered in his own excrement.

The Stiles death audit was mailed anonymously to a member of the Texas Board of Criminal Justice, the nine citizens who oversee the Texas prison system. Lawyers in the *Ruiz v. Johnson* federal court case also obtained a copy of the Stiles study as part of the *Ruiz v. Johnson* litigation. Except for some extraordinary circumstances, however, the deaths, the audits, and the mistreatment at Stiles would have remained secret. Secrecy is a way of life in Texas prisons—and a way of death.

Further, a 1997 study by UTMB pharmacists found that prison doctors treating diabetes "generally do not follow the guideline recommendations, and clinical markers were not improved." In July 1997, the Health Department inspected the dialysis office at the Estelle prison unit near Huntsville. The department's list of deficiencies ran 99 pages. Conditions at the Estelle dialysis unit were so bad the Texas Department of Health closed the prison dialysis unit in 1997 after finding "serious deficiencies," according to a State Auditor's report. Even after the unit was reopened, prisoners needing dialysis treatment in 1998 would find chairs still bloody from earlier patients. Again, in an institution that preserves secrecy, state law makes it impossible for a patient to discover whether, for example, a dialysis office fails to clean blood from its machinery.

The State Comptroller released her report in 1998 that raised a number of questions about the prison HMO's basic organization and how it was using the money that had been allocated. Meanwhile, some inmates and prisoner advocates reported to

the comptroller that prisoners had better health care *before* managed care was instituted, charging that not only had managed care failed to solve some of the prison system's endemic health problems, but that it had actually become part of the problem. The basic principle of an HMO, after all, is to limit care in order to save money, and that can leave prison inmates, who tend to be sicker than the general population because of their poverty and substance abuse, in a particularly vulnerable position.

The Health Service Division (1997) of TDCJ summarized the five most frequently found problems in the units it had audited. Of 58 units audited, 41 failed to follow up on a program of flu immunizations for offenders at special risk; 42 failed to adequately account for emergency room procedures; 44 could not document properly that they had counseled inmates in need of therapeutic diets; and 49 could not document that they had offered vaccines to inmates at risk for pneumonia, which would include the elderly, the chronically ill and those with HIV. Perhaps the most revealing statistic was that 48 of the 58 units missed an audit question concerning their documentation for access to care. In short, units were saying they had provided care—but did not have the paperwork to prove it.

In general, criticisms of UTMB's inmate medical care have been met with familiar resistance, denial, and spin by UTMB officials. A case example is Freeman, an inmate with HIV who was treated abominably:

> After prison officials allowed Cadarell Freeman to fester in his jail cell with ulcers eating through his throat and his feet swelling to the size of hiking boots, after yanking Freeman on and off prescriptions so often that he grew

> resistant to advanced HIV medications and dependent on a wheelchair, after a nurse asked Freeman if he would donate his organs when he died, which, she implied, would be soon, and after prison officials called Freeman's mother at 4 a.m. to say her son "probably wouldn't make it through the morning"—only after all of that did Cadarell Freeman suffer the last-ditch indignity of the Texas prison system. A bus driver told Freeman that if he wanted out, he'd have to crawl. (Ward & Bishop, 2001b, para. 1)

When Freeman stayed on the drugs prescribed by doctors at UTMB's prison hospital in Galveston, he gained weight and got better. Yet, a prescription in the Texas prison system is often just a piece of paper. Sometimes, Freeman said, the sacks of medicine he brought from Galveston were confiscated and not returned. Some weeks, according to Freeman's files, the inmate received only 3 of the 15 drugs he was supposed to be taking. For days at a time he would receive no medication at all. A note written on Freeman's chart while the inmate was at the hospital in Galveston said the inmate was so "frustrated at his inability to get meds as prescribed that he is threatening to commit suicide to get to new unit" (Ward & Bishop, 2001b). The internal prison system report in 1999 found there were "multiple dosing errors on virtually every medication order" Freeman received. When Freeman complained, the report said, prison unit health care workers "tended to roll their eyes and sigh at the mention of the offender's name" (Ward & Bishop, 2001b).

Another example was Alexander Oris, who "starved to death in infirmary," according to the TDCJ's internal review (Ward & Bishop, 2001b). UTMB, however, found "no lapse of care." Michael Anderson vomited for 3 days and had no bowel movements for 6 days before he died and "appeared to have been neglected in his

cell." Another man died a few days after he had been found covered in feces. Another was "left to die." Another "appears to have suffered from neglect."

Normally, when a peer review is this critical, most medical institutions would call for disciplinary action, but UTMB's medical director for the prison HMO, Jason Calhoun, overruled the physicians who found these problems, and no action was taken. Calhoun declared that the task force from the prison board had "no business" telling UTMB how to manage HIV care.

Another contributor to poor health care in Texas prisons are the "pill windows." With the advent of managed care in 1994, all medication had to be taken at pill windows. A survey team from the NCCHC found pill lines as long as 1,000 inmates in TDCJ. The wait for a pill can be onerous and long (and cold in the winter), especially if an inmate is disabled, ill, or believes that the medication is incorrect in some way. At closing time, regardless of the line, the window is simply shut, and those who did not get their medication have to come back later. In some cases, inmates have to choose between eating dinner and getting their pills. Chronically ill patients, such as those infected with tuberculosis, sometimes simply give up hope and do not bother to take their medication. For many inmates, it is not worth the hassle of going to the infirmary and waiting 3 days to see a doctor for something like the flu, a cold, or a headache. As a result, however, drug costs drop for UTMB.

In 2002 Judge Justice believed that he had no choice but to find that the prison meet "constitutional standards," but he noted that the prison did not meet the

"standards of humanity." These subsequent reports demonstrate serious concerns, issues, and questions that were supposed to be resolved by the Opinion of 1980.

How bad is health care in Texas prisons? Judge Justice wrote in 1999 that he had heard evidence of "significant, even deadly, inadequacies" in the medicine practiced on inmates. Prisoners have been left to die. "It is impossible to know whether these instances of poor care are exceptional or common. The state has made it that way."

July 1, 2002 marked the end of the 30-year-long inmate lawsuit against Texas and its prisons, known originally as *Ruiz v. Estelle* and more recently as *Ruiz v. Johnson*. Justice's signature did not simply bring to an end 30 years of bitter legal conflict, but formally recognized that after more than 100 years of institutionalized prison tyranny, the state of Texas is finally beginning to live up to its obligations under the laws and Constitution of the United States.

However, Texas may not deserve this dispensation. After hearing lengthy expert and inmate testimony concerning current prison conditions, Justice concluded that while the TDCJ had made much recent progress in lessening many of the system's worst brutalities, certain practices in TDCJ remained unacceptable—that is, illegal/unconstitutional. In particular, Justice (1999, 2002) pointed to the abuse of administrative segregation (i.e., solitary confinement), particularly against mentally ill prisoners, institutional indifference to prisoner-on-prisoner violence, and excessive use of force by guards.

In 1999, the Judge ordered that these particular elements of the system remain under federal control. However, by 2002 control of its prisons was handed back to the state, with the reluctant acquiescence of the inmates' attorneys and Judge Justice.

Research Question 3 Findings: Goals of the Court

What were the goals established by the court to achieve change? An excerpt from the Judge's Memorandum follows:

> It is impossible for a written opinion to convey the pernicious conditions and the pain and degradation which ordinary inmates suffer within TDC prison walls—the gruesome experiences of youthful first offenders forcibly raped; the cruel and unjustifiable fears of inmates, wondering when they will be called upon to defend themselves against the next violent assault; the sheer misery, the discomfort, the wholesale loss of privacy for prisoners housed one, two, or three others in a forty-five-square-foot cell or suffocatingly packed together in a crowded dormitory; the psychological suffering and wretched physical steeds which must be endured by those sick or injured who cannot obtain adequate medical care; the sense of abject helplessness felt by inmates arbitrarily sent to solitary confinement or administrative segregation without proper opportunity to defend themselves or to argue their causes; the bitter frustration of inmates prevented from petitioning the courts and other governmental authorities for relief from perceived injustices. (*Ruiz v. Estelle,* 1980, p. 1391)

Judge Justice issued this sweeping opinion against the state of Texas finding the "totality of conditions" in its prison system to be in violation of the U.S. Constitution in six major areas: (a) overcrowding, (b) security, (c) fire safety, (d) medical care, (e) discipline, and (f) access to the courts. The Opinion detailed remedies for each violation. The court assumed that its orders would be followed, which would result in substantive improvements to the health and well-being of inmates. The following is a summary of these ordered remedies:

1. TDCJ must end the practice of putting three inmates in one cell, end the practice of routinely housing two inmates in 45- and 60-square-foot cells, and reduce the overcrowding in dormitories.
2. TDCJ must end guard brutality, increase the number of guards, improve the selection and training procedures for guards, and eliminate the building-tender system.
3. TDCJ must improve its methods of fire safety, water supply, plumbing, wastewater, and solid waste disposal.
4. TDCJ must increase its medical staff, restrict inmates from performing medical and pharmacological functions, improve unit infirmaries, substantially renovate the main prison hospital, establish diagnostic and sick-call procedures that eliminate nonmedical interferences with medical care, improve pharmaceutical operations, update record keeping, and provide better medical treatment to all physically handicapped and mentally retarded inmates.
5. TDCJ must provide all inmates accused of disciplinary infractions with notice of charges and hearings, consider literacy and mental capacity and provide representation for those unable to represent themselves, inform inmates of their right to call witnesses, have sufficient evidence before ordering a "lock-up," improve solitary confinement, and upgrade administrative segregation procedures.
6. TDCJ must desist in blocking prisoners' access to the courts.

7. TDCJ must improve workplace safety and develop an adequate safety inspection program.
8. TDCJ must reduce inmate populations, break units down into smaller organizational entities, and build smaller units near large population centers instead of in inaccessible rural areas.

Research Question 4 Findings: Barriers to Change

What factors act as barriers to the change process? The court assumed that its orders would be followed and thus would result in change within key areas of the health care delivery system and the policies that govern it within the TDCJ.

Resistance as a Barrier to Change

Organizations do not like change. Because of the costs of designing and implementing new routines, old routines, once established, are highly resistant to change. Any change that threatens to disrupt the well-defined informal structures of custodial institutions very likely will encounter great resistance. Years ago Mary Parker Follett (1923, as cited in Graham, 1995) wrote about change as if she had spent a great deal of time behind the walls at Huntsville:

> Some people will continue to seek enjoyment of exercising power over others, even if it is an ineffective way of running organizations….For many reasons the change has been slow and halting. Organizational inertia is enormous; change is painful. (p. 295)

Additionally, in Veblen's view, any careful analysis had to unearth the long historical roots of the modern institutions (Lerner, 1976, cited by GAINS, 1998). A common thread runs through economic history, according to Veblen (1904/1973): "Whenever the institution of private property is found, even in slightly developed form, the economic process bears the character of a struggle between men for the possession of goods" (p. 34).

Resistance to Change From Federalism Versus States' Rights

From 1871 to well into the 1960s, the federal judiciary adhered to a "hands-off" attitude towards prisoners. The judiciary refused to intervene in prisoners' complaints out of their concern for federalism and separation of powers and a fear that judicial review of administrative decisions would undermine prison security and discipline. Prisoners, therefore, were isolated from the rest of society.

The result was a decentralized federal judicial system with a foundation in states' rights. Yet, federal judges' authority was firmly established, as manifested in the U.S. Constitution. Further, Congress enhanced the right of litigants to remove certain kinds of cases from state to federal court. The Judiciary Act of 1789 had limited removals, but the Habeas Corpus Act of 1863 afforded some protection by removal of suits to federal court (later affecting prison litigation).

Article III of the U.S. Constitution addresses the power of the court by establishing a Supreme Court and designating its jurisdiction. Article III, Section 1, of the United States Constitution of 1787 declares, "The judicial Power of the United

States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." In addition, the Constitution grants the judges of these courts life tenure "during good behavior" and requires that their compensation "shall not be diminished during their continuance in office." This provision was adopted to ensure that the legislature did not attempt to punish the members of the Supreme Court or any other judges for unpopular decisions (usually political issues).

Article VI of the Constitution addresses the supremacy of the national government, commonly referred to as the "Supremacy Clause:"

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Under the Supremacy Clause, everyone must follow federal law in the face of conflicting state law. A state statute is void to the extent that it conflicts with a valid federal statute, and a conflict will be found either where compliance with both federal and state law is impossible or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (*Edgar v. Mite Corp*., 1982). Similarly, the federal government has held that "otherwise valid state laws or court orders cannot stand in the way of a federal court's remedial scheme if the action is essential to enforce the scheme" (*Stone v. City and County of San Francisco*, 1992).

Federal judicial authority was longer in coming in institutional reform. Many federal judges have contended that state laws, policies, and procedures that systematically deny the substantial constitutional rights of citizens (minimum constitutional standards) require federal courts to vindicate those rights and to compel obedience to the Constitution. Nevertheless, it should be noted at this point that state officials have often raised the Tenth Amendment's reservation of powers to the states as a defense to the exercise of federal jurisdiction over actions alleging state violations of constitutional rights. This debate is ongoing.

Resistance to Change From the Plantation Model

Research Question 4c concerned resistance to change stemming from the location of the Texas prison system in a southern state, which was, and is, operated on the plantation model. The federal mandates of *Ruiz,* and continued oversight by the federal court notwithstanding, the current Texas prison system conducts business much as it did 100 years ago. Many prison units are run as large penal farms based on the old southern plantation model. Many observers have concluded that the TDCJ is still operating a "southern plantation" or "a neocolonial slave system" (Crouch & Marquart, 1989).

Between the years 1875–1925 the prison system was classified by historians as the most brutal and inhumane period of Texas correctional history. The narratives report that medical care was essentially nonexistent, particularly in the railroad camps

and convict wood camps. The prisons were referred to as the *Texas Gulag* where the prevailing philosophy was "mules cost money, men don't" (G. Brown, 2002, p. 18).

Resistance to Change From History of Slavery

Is the resistance to change rooted in the history of slavery in this southern state? The legal status of prisoners was poignantly expressed by the Supreme Court in 1871 as "slaves of the state" in *Ruffin v. Commonwealth* (1871). This ruling made it clear that prisoners, like slaves, had no constitutional rights or legal protections, had no forum for presenting their grievances, and basically could be treated in any manner without further recourse. It is stated in the ruling: The prisoner "as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state" (p. 796). After the Revolutionary War, Congress passed the Fugitive Slave Law of 1793, which gave legal support to masters seeking their fugitive slaves. In response, some states established personal liberty laws to protect citizens from slave catchers. Under these personal liberty laws, fugitives could testify before judges, and slave owners could not seize fugitives without a warrant for their arrest. The issue was revisited by Congress in the Fugitive Slave Law of 1850.

Additionally, the courts faced an influx of prisoners due to the general unrest and lawlessness of the readjustment period following the Civil War, including the freeing of the slaves. The Emancipation was met by Southern Whites with Black Codes, Jim Crow laws, and sending Black citizens to prison when labor was needed.

Under the pre–Civil War penal code, "Negroes" were not subject to imprisonment in the penitentiary; the master of the slave inflicted punishment without trial. With this new and confusing liberty, the "Negro" found himself entangled in a legal system that he did not fully understand, which most often sentenced him to prison.

Research Question 5 Findings: Facilitation of Change

Research Question 5 asked what factors acted to facilitate the implementation of the mandated changes. Answering this question involved political economy theory. Understanding why things happen as they do in institutions requires an appreciation of the inextricable linkages between the institution and the economic and political atmosphere, and the ideological and organizational contexts within which the institution functions.

The state prison is embedded within a political, economic, and bureaucratic system that includes the rest of the state government, from the courts, legislature, and elected representatives to related departments such as mental health and regulatory agencies dealing with finance, personnel, or public works. Additionally, there are important constraints on decision making at the institutional level such as departmental goals and policy, correctional standards and case law, plant design, budgets, institutional roles, and institutional culture.

Recently, in the ongoing operation of TDCJ there have been more occurrences of corporate profit such as the massive building boom, which benefited contractors who were politically tied to the chairman of the Prison Board. The same profit

motivation was not to be found in the health care system of TDCJ—until later, when UTMB was contracted to be the HMO for the system. Profits then were accrued in the amount of $26 million in 1998 by UTMB. UTMB has continued to make a profit each year since; however, the quality of the health care diminishes (Ward & Bishop, 2001a, 2001b, 2001c, 2001d, 2002d).

Political Factors

Are political factors involved in the success or failure of the court-imposed changes? The answer is a resounding yes.

TDCJ, as an organization, is clearly involved in a continuous political process. Because of the large and critical role of correctional organizations in this society, the outcomes of the organizational conflicts created by societal changes tend to have broad consequences for the whole society. Many of these conflicts have led to public policy conflicts, which, in turn, can affect funding patterns and program policies of the individual service organizations. Political institutions communicate their expectations for public agencies through formal actions, such as legislative enactments or a chief executive's appointment, and equally powerfully, through informal acts, such as budget allocations. This can lead to changes in the political balance of power in the state government and the TDCJ. These changes in the political environment have resulted in the massive expansion of the state prison system in Texas.

Constituencies surrounding the prison system and the Legislature are affected by the basis of organizational legitimation and authority as described by the political economy theory. Custodial institutions depend upon the external political process for their legitimacy, their formal authority, and their funds. Frequently, conflicts and tension arise among the constituencies of the organization, as evidenced between the actors in the *Ruiz* lawsuit. The power of the organization is expressed through the enforcement of administrative regulations and especially their traditions. This may or may not come into conflict with other constituencies such as the state Legislature, the funding source for the TDCJ.

An organization's power system is the systematic manner in which power, influence, and authority are distributed, mobilized, and utilized. This includes officials of TDCJ, the TDCJ Board of Directors, and the Legislature. Power is utilized to achieve or to maintain a set of goals, attitudes, and values; TDCJ officials and the TDCJ Board of Directors tried to maintain the status quo, as did the Legislature. The amount of power refers primarily to the degree to which resources and energies are directed toward or engaged in the influence process. The power system is a central factor in shaping an organization's economy.

An understanding of the power structure and its implicit ethos is necessary to understand the direction of organizational change within the TDCJ. Those with the power create organizational culture; thus, those in power, whether the TDCJ officials, the TDCJ Board of Directors or the Legislature, dictate the fundamental character of the TDCJ and the values of its personnel.

Clearly, politics drives correctional policy. Politicians have convinced the public that more imprisonment reduces the crime rate, although this is not based on research. The greatest challenge may be politics as the driving force behind the development and implementation of correctional policies. Lyons and Scheingold (2000) summed up the issue:

> We argue…for an approach to crime control that strikes a better balance between punishment and prevention on one hand and that deals with causes as well as symptoms on the other hand. Movement in that direction will be possible only if we understand why punishment has tended to crowd out alternative responses to crime. (p. 105)

There must be an informed decision-making process to achieve a balance between the punitive approach to crime control and successful correctional policies. These questions can be answered through research.

Economic Factors

Are economic factors involved in the court-imposed changes? Economic factors were involved in initial resistance to change and in many of the policies designed to comply with the court order. Economic factors have been a major part of prison operations since economic self-sufficiency first became a goal.

The threat of financial penalties may have been one of the main motivators for the state to finally comply with the judge's mandates. In December 1986 Judge Justice found TDCJ in contempt of court. After 15 years of the *Ruiz* litigation and the ongoing non-compliance with his Court's orders by the State, Justice (1986) wrote in his 96-page Opinion:

> In numerous cases, TDC unquestionably has not reached compliance with particular orders—some dated as early as 1981—and it obviously will not be [in compliance] in the immediate future.…In sum, it is unmistakable that on the whole, TDC has been habitually and inexcusably dilatory in fulfilling its obligations in respect to the relevant orders.

Justice's Opinion outlined a series of fines for the state: $800,500 a day or $24 million a month for noncompliance (Ekland-Olson, 1987, p. 244). Bill Clements had defeated Mark White in the gubernatorial campaign just before the Judge's Opinion was issued. Clements, having dealt with the *Ruiz i*ssue during his first term as governor was ready to comply with the Court. Therefore, in the State of the State address to the 70th Legislature, Clements announced,

> Let me state clearly the facts of the *Ruiz* case. The lawsuit is over. Let me state clearly the facts of the contempt case handed down by Judge Justice prior to my taking office: We must get in compliance as quickly as possible. We have no choice. (as cited in Ekland-Olson, p. 245)

Improving health care provision in the nation's prisons has come at a financial cost. Spending for the health care of prisoners has been increasing rapidly, as in the general population. Thus, correctional administrators have become interested in managed care strategies. Managed care reforms were developed for the purpose of restructuring health care delivery as a cost-containment procedure. Texas prisons contracted with the University of Texas and Texas Tech. The contract has proven to be controversial.

As Texas was expanding its prison system into one of the largest in the world, Texas State Comptroller John Sharp was looking for ways to cut costs. For the previous half-decade, the price of inmate health care had been rising at an annual rate

of 6%. With Texas planning to incarcerate 75,000 more people, a method had to be found to contain soaring medical costs. The method Sharp proposed seemed obvious, for it had already been tested in the free world: managed care. In 1993, as part of a sweeping audit of the prison system, Sharp urged the Legislature to take one more step and remove the TDCJ from health care almost altogether and instead hand the problem over to the state's two public medical schools. Some 80% of the managed care would be provided by the UTMB at Galveston, which had been giving specialized care to inmates for almost 50 years. UTMB would handle prisoner care in east and south Texas, where the vast majority of the state's prisons are situated, while Texas Tech Health Sciences Center in Lubbock would handle the remaining 20% of the units in north and west Texas.

Representative Allen Hightower, Sharp, and other legislative leaders saw that HMOs appeared to cut the cost of medical care. However, UTMB saved money by withholding care from inmates. Additionally, the university-run HMOs had no outside oversight. A State Auditor's report in 1998 chastised the Legislature for setting up a system in which two universities essentially hired themselves to provide a service. The auditor noted that the service was provided without sufficient outside monitoring. The prison health system is a $297 million-a-year business that runs largely without outside interference, review, or accounting.

Prisons as Big Business

If prisons are big business, is this a factor in the court-imposed changes? The health care system in prisons is one tentacle of the larger prison industrial complex. Schlosser (1998) defined the prison-industrial complex:

> The prison-industrial complex is a set of bureaucratic, political, and economic interests that encourage spending on imprisonment, regardless of the actual need. It is a confluence of special interests composed of politicians who have used the fear of crime to gain votes; aided impoverished rural areas where prisons have become a cornerstone of economic development; private companies that regard the roughly $35 billion spent each year on corrections not as a burden on American taxpayers but as a lucrative market; and government officials whose fiefdoms have expanded along with the inmate populations. (p. 124)

In the 21st century, Texas prison conditions and policies are surprisingly unchanged from 100 years ago, with the goals of prison self-sufficiency and profitability. The Texas prison system thus has roots as a business organization. The Texas prison system has been used by governors, other politicians, and their associates for monetary benefit. However, according to Crow (1964), operation of a prison system and its business is usually more productive when political influences and personal favoritism are not permitted to sway those in charge of prison business operations.

One example of the operation of the TDCJ is the behavior of the NRA as it benefits from new business opportunities involving prisons. An important and largely overlooked force in driving the prison boom in the United States is the NRA, which has lobbied for longer prison sentences and new prisons to profit its constituencies. In Texas in 1993 the NRA lobbied for billion-dollar bond initiatives to fund prison

construction. The NRA-backed pubic ad campaign in Texas can arguably be credited with the construction of an additional 76,000 prison beds in 2 years. At the federal level, the NRA lobbied hard for the 1994 crime bill, which increased the federal funds available to states for building new prisons from $3 billion to $10 billion. NRA fundraising has increased to almost double that of prior years.

Additionally, private prison operators have profited from the prison-building boom. Private prison companies, small towns in need of jobs, and counties have benefited. Other businesses have profited by reducing their labor costs.

Prisoners as Commodities

Do prisoners become commodities within the system, and is this a factor in the court-imposed changes? The findings of this study are that prisoners are indeed commodities. However, prisoners as a commodity tended to support the status quo rather than change.

The history of the prison system demonstrated the roots of prisoners as commodities. In New York's Auburn prison, built in 1821, prisoners worked manufacturing equipment to produce a variety of goods. Early prison factories resembled factories on the outside, and for a time prisoners produced goods that were sold in the free market. The use of machinery afforded greater levels of production, more uniform quality of finished products, and higher earnings for the prison—results guaranteed to please even the most cost-conscious legislators and prison administrators. The idea was for inmate labor to produce goods for sale, ostensibly to

cover operating costs. The Auburn system fit nicely within the larger structure of capitalism, characterized as it was by the need for cheap labor.

In the prison leasing system, lessees could employ prisoners in any way they chose, even subcontract them to other individuals, subject only to very minimal state regulation and control. In adopting the lease system, the state abdicated virtually all responsibility for the welfare of its prisoners, reducing them to commodities. "The state was embarking on the devilish and barbarous system of trafficking in human muscles and bones, weighing the convicts in the scales with gold….Nothing would now stand between the convicts and a living hell" (Crow, 1964, pp. 82–83).

Three important concepts in Marxian theory continue to be relevant: alienation, exploitation, and marginalization used by the capitalist society to maintain class inequality. Laborers in capitalist societies are simultaneously alienated and exploited by capitalists, who make a profit, according to Marx, from unpaid labor.

Summary

This historical retrospective analysis revealed sources of resistance to change. It may explain the reactions of the players involved or the judge's persistence. Judge Justice utilized the law and the court as the agent of social change. For several decades, social scientists and legal scholars have debated a large but crude question: Can the legal system be used to change society? Since the 1950s reformers have used the courts to effect specific remedies for group problems and social wrongs, the use of litigation as an instrument of social reform. The federal courts then opened their

doors to the claims of the disenfranchised and minorities in American society such as the prison population. What was extraordinary about the *Ruiz* suit was the courage and tenacity of this particular judge, which changed the outcome. After all, one could argue the more there was change, the more things remained the same; in this case, they may have grown a bit worse.

Research Question 6 Findings: Life Expectancy of Changes

Research Question 6 investigated the "life expectancy" of changes that ultimately occur after federal oversight ends. The question is whether TDCJ is "backsliding" on the standards or the standards were ever satisfactorily reached.

David Ruiz recently stated that the conditions inside the Texas prison system are slowly deteriorating since the federal oversight was stopped. The TDCJ probably will always need to be monitored, especially by public advocacy groups, as history shows that TDCJ is unable to monitor itself. The issue of the mentally ill being housed in administrative segregation remains as Judge Justice prepared the final order of the *Ruiz* lawsuit. An exploration of the evolution of the health care system in TDCJ might explain the results of the judicial mandates and what continues to be lacking in the system, and what is in store for the future of the health system. The contract with UTMB raises grave doubts about the future of prison health care in TDCJ.

Judge Justice wrote in 1999,

> The measure of a prison system's constitutionality, as always, is not its production of policies, but its treatment of inmates.…These are human beings who made mistakes, not animals. They will leave prison to work and live right

> beside us, and if we treat them like animals when they are in prison then that is actually how they will act when they get out.

Many involved in the *Ruiz* lawsuit have stated their belief that without oversight the TDCJ health system will rapidly deteriorate. In a 2004 interview, Judge Justice stated that he tried to maintain judicial oversight as long as he could because he knew what would happen when federal oversight was gone.

Social workers must not forget that as social inquirers in the public domain, they are morally and ethically compelled to assume greater responsibility for and a more active role in the social policy arena. Social workers and others must become negotiators and social change catalysts seeking social justice as proactive and accountable players in the policy arena.

Chapter 5

Discussion, Implications, and Recommendations

Discussion

The goal of this dissertation was to identify, describe, and analyze to what extent, if any, judicial intervention (via *Ruiz v. Estelle*) affected the health care system and its policies within the TDCJ. Additionally, historical and economic factors in directing the course of public policy were articulated, including prison labor and its history amid southern capitalism.

An important question is whether the process has been a success in changing the quality of health care. Defining and measuring success in health care reform is difficult. The definition of success will be different for the TDCJ officials (e.g., cost containment) and inmates (better quality of health care). Further, the closed nature of the Texas prison system prevents access to quantifiable data, such as health care budgets, numbers of physicians, licensure, turnover, nurses, medication costs, deaths, or sickness rates of inmates. Worse, any data available may not be not reliable. Therefore, the objective is not to determine that the intervention was a total success or an absolute failure, but rather to evaluate the extent to which changes in key areas of health care policy occurred or did not occur and the nature of those changes.

Judge Justice's opinion against the state of Texas found the "totality of conditions" in the prison system in violation of the U.S. Constitution in six major

areas: (a) overcrowding, (b) security, (c) fire safety, (d) medical care, (e) discipline, and (e) access to the courts. See Table 3.

Table 3

Texas Prison Unconstitutional Situations, 1980 and Currently

	Court injunction 1980	Current situation
1	TDCJ must end the practice of putting three inmates in one cell, end the practice of routinely housing two inmates in 45- and 60-square-foot cells, and reduce the overcrowding in dormitories.	Overcrowding for the most part is resolved. The cells, however, are rarely that large. The judge wanted single cells.
2	TDCJ must end guard brutality, increase the number of guards, improve the selection and training procedures for guards, and eliminate the building-tender system.	The building tender system has been eliminated after years of denying it existed. The system is currently 3,500 guards short, and they need more than that. Training of guards has been reduced from 6 months to 2 weeks. The judge stated that he continues to be very concerned about guard brutality towards prisoners, considers this unconstitutional.
3	TDCJ must improve its methods of fire safety, water supply, plumbing, wastewater, and solid waste disposal.	These items have been greatly improved (someone made a profit).

	Court injunction 1980	Current situation
4	TDCJ must increase its medical staff, restrict inmates from performing medical and pharmacological functions, improve unit infirmaries, substantially renovate the main prison hospital, establish diagnostic and sick-call procedures that eliminate nonmedical interferences with medical care, improve pharmaceutical operations, update record keeping, and provide better medical treatment to all physically handicapped and mentally retarded inmates.	The number of medical staff has increased but so has the prison population, so no real increase. There are mixed reports about the various unit infirmaries-dialysis unit shut down by the health department in 2004. Instead of renovating the hospital, a contract was made with UTMB and Texas Tech to handle medical care. The procedures to request a medical appointment are seriously flawed. If the records are in better shape, the public is not aware since they will not release the information. The treatment of the physically disabled and mentally retarded remains questionable due to how this is defined. A physically disabled person may request an artificial leg, but TDCJ may deem it not necessary; therefore, is there better medical treatment? The majority of mentally retarded are not classified.
5	TDCJ must provide all inmates accused of disciplinary infractions with notice of charges and hearings, consider literacy and mental capacity and provide representation for those unable to represent themselves, inform inmates of their right to call witnesses, have sufficient evidence before ordering a "lock-up," improve solitary confinement, and upgrade administrative segregation procedures.	The steps around disciplinary infractions vary by unit. It means that it is up to the inmate to know their rights. Lock-up remains at the will of the guards. Solitary confinement is another grave concern that the judge had at the closing of the case. He declared it unconstitutional. This is a complicated issue and would take much more space to explain.

	Court injunction 1980	Current situation
6	TDCJ must desist in blocking prisoners' access to the courts.	This was addressed during the *Ruiz* trial. Again, it depends on the guards of that particular unit. Law libraries were required under *Ruiz.* But the PLRA eliminated that in 1996. The judge declared the PLRA unconstitutional but was overturned.
7	TDCJ must improve workplace safety and develop an adequate safety inspection program.	From most accounts this has been accomplished.
8	TDCJ must reduce inmate populations, break units down into smaller organizational entities, and build smaller units near large population centers instead of in inaccessible rural areas.	TDCJ has been ordered to not have more than 95% of the allowed number of prisoners. In April 2005 they have passed this mark. So they release more people on parole and they do not pick up inmates waiting in county jails. This is not solved even after the massive building of prisons during the 1990s. The other listed here were overturned by the Appeals Court, and TDCJ does not have to comply.

Unfortunately, as outlined in this chapter in the Prison Health Care Research and Data section, data to evaluate health care in prisons are lacking and unreliable. Question: If prison doctors actually opened up their records for peer review, what would their peers find? Records are not available to the public to read. Prison's unaccountability, invisibility, and its organization create questions/concerns about the prison's medical service that are difficult to answer.

Quality of care should be assessed through research and publication; prisons should be much more open in letting outside academics into prisons to do research. Keep prison records open to the public, media, and political scrutiny. Our prisons are

as full of unanswered questions as they are of unhappy prisoners and tension. A rigorous operational program of research is needed to debunk the many myths about life in TDCJ. If the organization is hiding information, then the assumption is that they have something to hide. This study investigated the resistance to change within the TDCJ, including the sources of resistance and arrogance. Refusals, denial, recalcitrance were barriers to the settlement of the lawsuit. Moreover, this inquiry addressed whether changes that were the result of court mandates in the *Ruiz* lawsuit are short lived or long term.

Added to all of this is the explosion in the prisoner population. A report released July 26, 2004 by the U.S. Department of Justice Civil Rights Division revealed that the prison boom in the United States shows little signs of slowing, despite a significant decline in crime rates in the past decade. The prison boom has produced a million or more new jobs for prison guards and others, largely in poverty-stricken rural sections of the country where no other jobs are available.

Additionally, there has been a discernable hardening of public attitudes: The United States has become a very punitive society. Consequently, prison administrators had to cope with an increased prisoner population, prison conditions increasingly declared unconstitutional, and public and legislative unwillingness to provide funds to improve facilities. The relations between political, economic, judicial, and administrative decision making became complex (see Figure 5).

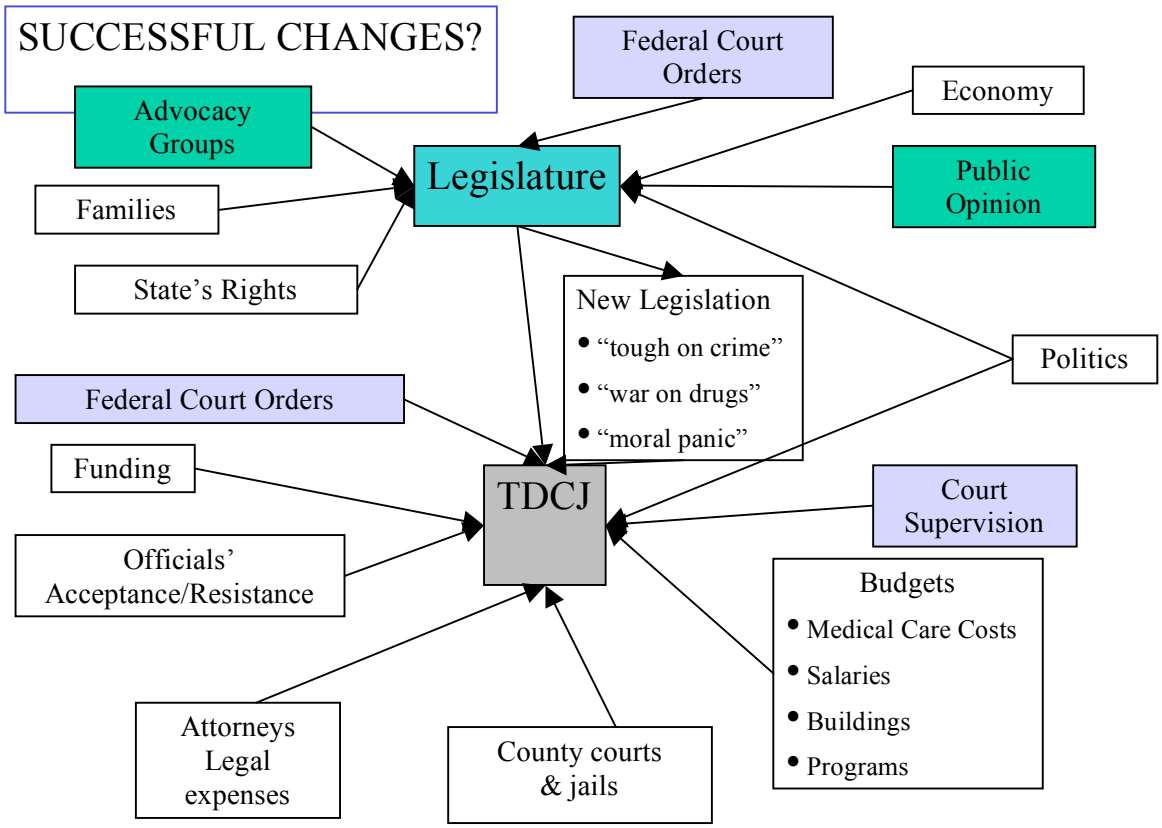


Figure 5. Variables that effect health care in the TDCJ.

Attention must be given to the internal processes as well as the external economic and political processes that effect change. External pressures may come from societal norms and values. Constituencies surrounding the prison system and the Legislature are affected by the basis of organizational legitimation and authority. Litigants utilized this power framework to get a better grasp and understanding of the characteristics of the factors that contribute to the shaping of an institution and ongoing policymaking.

To achieve compliance with the court's mandates from TDCJ, Judge Justice was forced to issue sanctions in the amount of $850,000 per day, which he later rescinded upon agreement with Governor Clements. Cases such as *Ruiz* prove that dispute resolutions must rely as much on political and economic factors as on the legal powers in states where reform is mandated. The goal in prison cases in Texas was preservation of inmates' 8th Amendment rights in spite of opposing state politics and economics at the time. TDCJ officials, the Legislature, and the governor were all unwilling to give up power and social control.

A century ago, individuals incarcerated in prisons had virtually no rights. Prisoners were considered to be "slaves of the state." Then in 1972 inmate David Ruiz filed his handwritten petition with the Eastern District of Texas alleging that the conditions in Texas state prisons were so brutal they violated federal law. He thought he had a good case. History proved him right.

Overall, the federal judge's recommendations were met with resistance based on (a) Texas' independent, states' rights attitude; (b) arrogance from prison officials who, based on a system with little oversight, were simply convinced that the judge was wrong; (c) an ingrained history of a plantation system, treating prisoners as commodities with limited rights; (d) money; and (e) a culture of secrecy within the TDCJ and the Legislature. This secrecy has also resulted in a lack of accountability. There was an unmitigated values-laden gap between the court judgment and the achieving of policy changes within the TDCJ. The court had to contend with prevarication and outright opposition from correctional departments. It is well known

that any change that threatens to disrupt the well-defined informal or formal structures of custodial institutions likely will encounter great resistance. Therefore, coercive strategies of change alone may not achieve satisfactory results. Customarily, judicial alteration (which prison officials saw as interference) of the old status quo rapidly creates disagreements, tension, and massive resistance. Judge Justice had learned through previous litigation that when an institution has been in the habit of asserting total control over those confined within its walls, it is likely to be highly resistant to challenge and change. So it was with the TDCJ and the state of Texas.

However, one dominant factor led to change in the TDCJ: the judge. Following the example of Marshall, Warren, and Thurgood Marshall, this individual's persistence and determination may be one of the greatest factors in change in the TDCJ. Without Court intervention, these changes might never have taken place. The cornerstone of the American legal system rests on the recognition and acceptance of the Constitution as the supreme law of the land. The paramount duty of the federal judiciary is to uphold that law (*U.S. Constitution*, Art. VI, 2; *Marburg v. Madison*, 1803). Prison reform begins and ends with the Constitution, the Bill of Rights, and Amendments to the Constitution.

Today the constitutional obligation of government officials who incarcerate inmates to provide for their medical, psychiatric, and dental care is well established. The years that have passed since *Estelle v. Gamble* (1976) affirmed that prisoners had a right to be free of "deliberate indifference" to their serious health care needs. This stance has resulted in the development of both case law and national standards

regarding correctional health care. As the courts have sought to protect inmates from unnecessary physical and mental suffering, three basic rights have emerged: (a) the right to access to care, (b) the right to the care that is ordered, and (c) the right to professional medical judgment. The failure of correctional officials to honor these rights has resulted in protracted litigation, the awarding of damages and attorneys' fees, and the issuance of injunctions regarding the delivery of health care services.

Litigation as Social Reform

Judge Justice utilized the law and the Court as an agent of social change. The *Ruiz* case is an extraordinary situation where the court acted in a most unusual fashion—in effect, becoming an administrative agency and closely supervising implementation of court mandates (greatly resented by the TDCJ and the state). These notable facts required a hard-fought, long-term battle to contend with the persistent recalcitrance and noncompliance by the TDCJ. Judge Justice (1973) wrote in an article discussing the need for federal court intervention into institutional behavior, after the legislatures have failed, "If these were the results in the legislatures, then it seemed better to avoid politics altogether." This is similar as what Judge Johnson stated: "Judges are not wardens, but we must act as wardens to the limited extent that unconstitutional prison conditions force us to intervene when those responsible for the conditions have failed to act" (*Harris v. Flemming, 1988*).

The great merit of judicial intervention may be that the realities of prison policy decisions are laid on the public line: The price of sentencing decisions and

correctional rhetoric, both financial and in the quality of the prisoners' lives is laid bare. During hearings a vast amount of detailed evidence typically emerges about the minutiae of daily life in the prison. In anticipation of hearings, prison administrators prepare fuller accounts of day-to-day policy in order to give their management practices credibility. Directly or indirectly, the whole process stimulates greater accountability for what goes on in prison in the name of the community.

The use of litigation continues to be an instrument of social reform. By appealing to the legal system, litigants can make claims for social justice based on traditional American constitutional values. Judges utilize case precedent to justify, strengthen, and add credibility to court rulings. For example, in 1974 the courts held that even though prisoners' rights and civil liberties were unavoidably diminished to some extent by the very fact of incarceration, "there is no iron curtain drawn between the Constitution and the prisons of this country" (*Wolff v. McDonnell,* 1974).

This use of litigation as an instrument for systemic organizational change demands a wide breadth of understanding by the judge. More often than not, the class action suit requires monitoring by the court, expertise, and staying power to insure that initial changes are not subverted and that resources are available to challenge the expected massive resistance of the institution. For these reasons it is imperative that the federal judge be willing and able to employ innovative administrative machinery to overcome the resistance to judicial remedies.

Society: Why We Should Care

A prison is representative of its society, a snapshot. The study of the prison is therefore a study of society. Dostoevsky wrote, "The degree of a civilization in a society can be judged by entering its prisons." Davis (2003) wrote, "Prisons should not be the catchall solution to all of the social problems that we have—to mental illness, to homelessness, to lack of health care, to the lack of education" (p. xi). Inmates in prisons are overwhelming poor, are disproportionately minorities, and have the added stigma of having been charged with transgressing society's laws. Why should anyone care whether the health services provided to these individuals are adequate? Perhaps because as Dr. Alvin Thompson (1979) suggested in a speech, the care and treatment provided to the incarcerated reflects the "hallmarks of a civilized society."

Harry M. Whittington, a former member of the Texas Board of Corrections, wrote in the forward of *Texas Prisons*,

> The [Texas] prison system is probably the least understood public institution in Texas….Few citizens have been interested in learning of the vast financial, legal and human problems involved. Most of us are also unaware that this massive effort at punishment results in the incarceration of only a very small percentage of criminals. The more we learn of the history, politics, and legal requirements of our prison system, the more we will be able to participate in making the proper decisions about its purpose, management, cost, and value to society…
>
> My six-year stint as a member of the board of one of the state's largest agencies was truly an eye-opening experience. I had no idea that it was possible for a state agency to operate so autonomously. Neither the legislature with its oversight committees, the state auditor with his annual financial reviews, the attorney generals who are the agency's lawyer, not the citizens who serve as board members were interested or effective in placing the TDC

> director and staff under proper controls and in compliance with the law. (Martin & Sheldon Ekland-Olson, 1987, pp. x-xiv)

The availability and quality of health care, coupled with the overall authority and power issues, becomes a critical element/variable in evaluating prison living conditions and the readjustment of prisoners as they reintegrate back into society upon release.

Moreover, the incarcerated community must not be considered a small, separate population with minimal relevance to the outside community. People who are currently in the criminal justice system, those who have been in the past, and those who are destined to be in the future comprise a large segment of the overall U.S. population, particularly in urban centers. Furthermore, the view that physical separation limits the health threat of prisoners to the outside community is a dangerous misconception. The number of inmates released into the community annually should dispel this myth, as should the average length of stay in local jails, which is often on the order of several days to several weeks. There are public health implications for prisoners as well as the general population in this country. Generally, prisoners are released from prison in worse condition physically and/or mentally than when they entered prison. Incarcerated individuals experience disproportionately higher rates of infectious and chronic diseases, substance abuse, mental illness, and trauma than the general population. Since the majority of inmates are eventually released back to their communities, interventions to address their health and mental health problems present opportunities to improve the public's health and safety

(NCCHC, 2003a, 2003b). In 2004 it was estimated that 13 million Americans had been convicted of felonies and spent time in prison. The prison system releases an astonishing 650,000 people each year—more than the population of Boston or Washington, DC.

Implications and Recommendations

Implications and Recommendations for the Legislature

Continued oversight to prevent backsliding. In 2002, after hearing lengthy expert and inmate testimony concerning current prison conditions, Justice concluded that while the TDCJ had made much recent progress in lessening many of the system's worst brutalities, certain practices in TDCJ remained unacceptable—that is, illegal/unconstitutional. Judge Justice wrote in his Opinion issued June 2002**,**

> TDCJ inmates are still victims of an unconstitutional system and the conditions of confinement in administrative segregation are unacceptable [essentially solitary confinement], the failure to provide reasonable safety to inmates against assault and abuse, and the excessive use of force by correctional officers in Texas prisons.

In 2002 a major concern continued to be that the job of providing health care to Texas prisoners was handed over to the University of Texas Medical Branch (UTMB) and Texas Tech and that hundreds of inmates die every year in Texas prisons (Smith, 2002). Yet reviews of those deaths and the medical care given to those inmates are kept secret from the public. Reports by outside agencies that have been made public reveal a pattern of improper care and neglect that has made many

inmates sicker upon release and likely contributed to the deaths of others. Most of the information regarding prison health care is kept secret by legislative enactment. When the *Austin American-Statesman* attempted to obtain some of this information (Ward & Bishop, 2001d), Attorney General John Cornyn ruled that most of it would remain off limits.

Competitive bids. Additionally, the state does not ask for bids for medical services. This must be changed by the Legislature. The State House of Representatives removed that requirement in 1993. Thus, there is no way to know the true market value of the services. The Legislature should reinstate competitive bids in all areas.

Texas legislators should repeal a law they unwisely enacted in 1999 that prohibits prison system officials from monitoring prison medical care. Since 1993, no independent agency monitors the care given to Texas inmates; the universities decide for themselves what care is proper.

Accountability. UTMB has no independent evaluators or accountability. It is a $297 million-a-year business that runs largely without outside interference, review, or accounting. Recent audits said that the Correctional Managed Health Care Committee "failed to properly document nearly $16 million in state money that was transferred to UTMB and Texas Tech University" (Ward, 2005, para. 10). However, the UTMB claims it is operating at a loss, blaming budget cuts for providing "decreased access to health care for thousands of convicts" (Ward, 2005, para. 14).

Jim Cook, one of the health system's former administrators, has said openly that costs have been cut by eliminating personnel that he says are necessary to provide adequate care. Cook stated that he has seen plenty of documents that make him believe UTMB has been making money for itself and some of its administrators and physicians by withholding care (as cited in Berryhill, 1998). Cook began at TDCJ as a unit medical administrator in August 1987 and 2 years later was given a regional administrator's job overseeing 10 units. After the TDCJ building boom started in 1989, he at one time supervised the medical care at 20 units. "When UTMB took over," he said, "no one had any experience at a prison unit. The approach was typical of managed care: Cut costs, cut care." Part of the HMO's problem, Cook said, is that UTMB has eliminated important clerical positions and consolidated nursing positions with administrative positions. The result is both inadequate care and inadequate documentation, according to Cook and others. Cook provided an example of inadequate care:

> I had an inmate shipped from the Hodge Unit in Rusk, which houses mentally retarded inmates. He was a brittle diabetic and had bad teeth, and we sent him to Galveston to have his teeth extracted. UTMB put him on a *chain bus* to Estelle Unit for a layover before returning him to Hodge. No one read the orders on him. He didn't get insulin for six days, and he died. He should have been kept in Galveston, and if he were moved, moved by ambulance. Several orders written by the dentist were ignored. (Berryhill, 1998, para. 42)

According to the Texas State Auditor's Office (2004) report, "Deficiencies in the Correctional Managed Health Care Committee's management of inmate health care and potential conflicts of interest between the committee and university providers could indicate that a separate committee is no longer critical to the

management of contracts for inmate health care." The audit is the second in 6 years. Both have criticized the agency's fiscal and contract management.

> Many of the Committee's contractual duties are actually performed by either the Department of Criminal Justice or the university providers. In addition, potential conflicts of interest in the relationship between the Committee and the university providers make contract provisions difficult to enforce and may contribute to the lack of fiscal oversight….The contracts between the Committee and the university providers for the provision of inmate health care do not ensure that the interests of the State are protected nor do they ensure that the university providers are held accountable for the cost-efficient delivery of quality services. The contracts lack basic provisions such as the evaluation of contractor performance, remedies for non-performance, and financial reporting requirements. Because the Committee does not require the university providers to maintain or report complete, detailed financial records, we were unable to determine if the current appropriation amount reflects the true cost of providing inmate health care. (Texas State Auditor's Office, 2004)

In general, there should be a close investigation of the organization and relationships between UT-Austin, Texas Tech, UTMB, and the management committee.

Implications and Recommendations for the Public: Opening a Closed System

More transparency and increased oversight should be the goals. Public interest and pressure on the Legislature should battle the culture of secrecy and open up the closed institution of the TDJC. In 2001 Ward and Bishop found themselves stymied at every turn for information about prison conditions—information that should be public (and is in other states) but is kept secret in Texas by prison administrators, often with the cooperation of the Legislature. Data about health care before and after *Ruiz* are hard to come by.

Attorney General John Cornyn ruled in 2001 that reviews of deaths in state prisons are confidential under state law. When the reporters asked Attorney General Cornyn to rule on the question of maintaining secrecy over this information, Cornyn ruled against disclosure and in favor of prison administrators. Unless state law is changed, that is the way it will stay. As Martin and Eckland-Olson (1987) wrote in *Texas Prisons*,

> If we allow our penal institutions to once again vanish from public view, they could again develop into a law unto themselves. Above all else, the struggle over the past two decades demonstrates that prisons are an integral part of the broader social fabric. By resisting the temptation to push prisons from public view, we assure a more informed, continuous, and therefore less disruptive adjustment to evolving standards of decency. (p. 247)

Harry Whittington (as cited in Martin & Sheldon Ekland-Olson, 1987, Forward) noted, "The prison system must be in the public view at all times to prevent the same from happening in the future."

The Court has issued orders and mandates in the *Ruiz* litigation. In 1980, 1993, 1996, 1998, 1999, 2000, 2001 investigative studies have been conducted. Reports have been shelved. The Texas State Auditor's Office (2004) described the way the state provides health care to its prisoners as "atypical," a system governed in a way that "creates the potential for conflicting loyalties." As in other areas of TDCJ there often appears to be conflicts of interest between its employees and an outside connection of some kind. In recent decades, prison medical care improved because a few determined people (the advocates) fought against inhumane conditions.

Implications and Recommendations for the TDCJ

Mental health care. Prisons and jails must provide mental health screening at intake to identify serious problems, including potential suicides (*Balla v. Idaho Board of Corrections,* 1984). Additionally, there must be some means of separating severely mentally ill inmates from the mentally healthy. Mixing mentally ill inmates with those who are not mentally ill may violate the rights of both groups. Conditions in administration segregation are not pleasant. There appears to have been little change in the use of administrative segregation over the last 100 years, especially for the mentally ill. Judge Justice (1999) wrote that the administrative segregation units in Texas are "virtual incubators of psychoses…They inflicted such cruel and unusual punishment that confinement in them violated the Constitution."

Thus, in the long run, the effective management of these disorders, necessarily a conjoint effort between custody and clinical staff, should not only benefit inmates with these disorders but also contribute to the order of the prison and the cost-effectiveness of the psychiatric services department.

Accurate records. As pointed out in previous sections on the feasibility of research, access to care *must be measured* by how well the unit tracks and disposes of individual cases, not by arbitrary medical encounters. Adequate medical care is measured first by whether the inmate is seen in time, and second by the appropriateness of the treatment. Providing proper care requires keeping accurate medical records, and while encounter forms are good for public relations, they mean

little to medical records specialists. Additionally, records should be accessible by the public, as long as they do not violate patient privacy rights.

Telemedicine. "Texas should expand the use of telemedicine in its prison system to reduce transportation costs and use correctional telemedicine resources for rural health care initiatives and distance learning" (Texas Comptroller's Office, 2000). In its simplest form, telemedicine can be the exchange of medical information by phone or fax. A more sophisticated variation is an interactive audiovisual consultation between a patient and a doctor, or between two physicians, using high-resolution cameras, monitors, electronic stethoscopes, and other advanced medical equipment. Telemedicine allows health care professionals in remote or isolated areas to consult with distant medical specialists. It is ideally suited to a correctional setting where security and access to care are constant concerns. UTMB and TTUHSC have installed telemedicine in 12 and 13 prison units, respectively.

Telemedicine allows for the delivery of specialized medical care within a prison unit, thus reducing the need for inmate travel and for the cadre of security personnel that accompany inmates to medical appointments. Telemedicine use is increasing at both universities, especially at TDCJ's Prison Hospital in Galveston. TTUHSC plans to install telemedicine in every unit that houses 1,000 or more inmates. Currently, telemedicine facilities are in operation at or near all TDCJ transportation hub sites (Texas Comptroller's Office, 2000). Expanding telemedicine within the prison system would improve inmates' access to care, shorten the wait for

a specialty appointment, assist and educate unit health care providers, and reduce the cost of inmate transportation and security.

Inspections/accreditations. In order to achieve a minimum standard of correctional health care in the U.S., there must be strong incentives and sufficient resources for all correctional facilities to meet nationally recognized protocols and standards of health care. Currently, only 10% of America's jails and prisons are accredited by the National Commission on Correctional Health (NCCHC) or the American Correctional Association. At a minimum, all correctional facilities should strive for NCCHC accreditation.

Implications and Recommendations for Social Work

This study has important implications for social work research and practice. Social workers in the criminal justice domain have concerns for policy as it affects their role as social workers and the well-being of inmates. The sheer numbers involved in the criminal justice system in Texas and the effect on local communities dictate an immediate need for social workers to become knowledgeable about the correctional system. Social workers continually encounter this at-risk population. To assist this population, social workers need an operational understanding of how the system works. The goal for this study was to contribute to the understanding of the behavior of this organization and to add hands-on functional knowledge. This information adds to the knowledge base of social workers for future reference. This

study helps to illustrate the need for and the relevance of research and policy formulation in the criminal justice field to social work practice.

Social workers can serve as liaisons between inmates and the prison system about problems such as securing medical care or visitation issues. Social workers thus have the potential to fill an important role within the correctional system. A better understanding of the behavior of the correctional organization, TDCJ, will enable reentry of social workers into this system.

Social workers can fill the gaps in the treatment programs and life-skills training programs before the prisoners return home. The goal is to give prisoners a better chance to succeed in their re-entry into society and not to become part of the recidivism statistics. A few examples of areas in which social workers could contribute are the following:

1. Diversion and alternative programs such as drug courts and mental health courts and supervision release programs;
2. Assessment, screening, and diagnosis of mental illnesses;
3. Prison survival;
4. Research on effective interventions and programs;
5. Therapy groups;
6. Individual counseling;
7. Substance abuse programs;
8. Programs for those who have experienced child abuse and sexual abuse;
9. Domestic violence programs for the abusers and the abused;

10. Reintegration programs;

11. Training for prison guards; and

12. Programs/classes on self-esteem, parenting, life skills, money management, jobs, and housing;

Further, Cripe (1990) addressed the need for more academic involvement in the criminal justice field in order to produce more worker involvement:

> What we need is more academic involvement in the corrections field, in both research and instruction. Expanding and improving our schools of criminal justice, criminology, and social work, with specialization on entry into corrections professions, will enhance the quality of workers in this field. (as cited in Dilulio, p. 283)

Recommendations for Future Research

Cost Effectiveness

The applicability of research in prison issues is clear. Research should be a routine component in the decision-making process about issues of cost effectiveness and benefit–cost analysis. Until recently, research on such issues was rarely considered. After years of prison litigation, it is evident that a major impact of federal court intervention into the management of state prisons has been to dramatically increase state budgets. Yet little research has addressed the costs and benefits of various issues within the prison system. Cohen (2000) pointed out, "Despite their widespread use, cost-effectiveness and benefit–cost analyses have not been staples of the criminal justice policy analyst's tool kit" (p. 263).

Prison Health Care Research and Data

Additionally, there is consensus among researchers that prisons lack services in diagnosis and treatment in the physical and mental health programs (Blumenthal, 1994; Halleck, 1986, as cited in Marquart & Brewer, 2000; Teplin, 1984, 1986; Torrey, 1997). Few, if any, studies have sought to ascertain the quality of care provided to prisoners and humanitarian issues. An important question in prison reform litigation is whether the process has been in any sense a success in changing the quality of health care. But defining and measuring success in health care reform is difficult.

Unfortunately, no comparable national surveys have identified the level and extent of health care services in state prisons. Indeed, such a survey still needs to be conducted. Defining and measuring success in health care reform is difficult. It can be quite complicated to define prison health care as "humanistic" or "high-quality." Researchers have used mortality rates as a traditional measure of health. At this time, mortality cannot be utilized as a reliable and valid measure of health because the data are not reliable. Morbidity appears to be even more difficult to use as a health status indicator than mortality, either conceptually or pragmatically. Activity counts have been suggested as a possible methodology for health measurement. Again, there is a concern about reliable data from the prison system; also, activity counts are only quantitative indicators—and as such, do not account for the qualitative aspects of medical care.

This discussion comes back full circle to the constraints of data availability and cost. For these reasons a comparison of indicators/variables such as the percentage of the numbers of doctors employed to the number of inmates from year to year would not be a valid and reliable measurement with the current available data. This translates into knowing that data may be skewed concerning the number of clinic visits, number of doctors and nurses, and number of trips. Moreover, TDCJ officials cannot even count heads adequately; for instance, due to concerns about prisoner counts and overcrowding, inmates in transport around the state are not included in the daily count, which can include around 10,000 inmates at any one time. Therefore, researchers must rely on prisoner reports and other outside sources of information.

TDCJ Research

Researchers should look at TDCJ management, organization, and process relationships with prisoners and their health care. Researchers could compare the continued demands of the federal Courts as well as information from audits on the Texas system to its responses. Research should examine the patterns of interaction between the federal courts and the state of Texas, including the responses of state officials to interventions.

The TDCJ system must adopt a model or create its own model of health care. This would give some direction and life to the system. Various proposed health care models in other states and areas could be explored. The NCCHC (2002) study, "The Health Status of Soon-to-Be-Released Inmates," has several models. For instance, the

New York and South Carolina prison systems have successfully reduced incidents of self-mutilation by reducing barriers to psychiatric services.

Fee-for-Service Prison Health Care

A growing number of states and localities have adopted policies that charge inmates for various types of health care encounters (C. Brown, 1996). Despite practical and ethical questions regarding implementation of a fee-for-service system (Rold, 1996, as cited in Flanagan et al., 1998, p. 185), the courts have tended to uphold carefully crafted systems and look to the following issues when evaluating such programs: Is medical care provided first with payment to follow? Are inmates who cannot pay nevertheless provided with necessary care? Is emergency care being provided regardless of payment? Is the payment amount reasonable relative to the inmate's resources so that it does not effectively deny care? Are chronically ill inmates allowed access to follow-up care despite cumulative charges? Is there a fair system for applying the charges and granting exceptions? To date, few statistically valid studies have produced data on the efficacy of fee-for-service plans for inmates. At least some data show, however, "distressing examples" of possible denial of care when prescriptions and "offsite" referrals were reduced substantially after introduction of a fee-for-service program (Faiver, 1998). More sophisticated analysis is expected as experience with such programs continues.

Additional Research Questions

Additional research questions include the following: What do prison doctors do? Are prison doctors actually seeing the inmates when requested? What types of medical problems and mental health problems are most prevalent in prisons? Are prison doctors overprescribing medication? Are medications provided in adequate amounts when needed? Are prison doctors not administrating medications as needed? Is it possible to practice good medicine within the difficult conditions of the prison setting?

How can suicide be prevented within the prisons? How can the problem of inmates with mentally health problems best be managed?

How do other countries run their prisons and provide medical care for inmates? Can we learn anything from them? Finally, how do we make the organizations more responsive to the clients that they are mandated to serve?

The last few years have brought developments that are influencing the course of correctional health care and the law, including fee-for-service plans, the Prison Litigation Reform Act, and sexual predator laws. The legal ramifications of these developments are still emerging and should be explored as they develop.

Conclusion

Conditions threatening the health and safety of inmates continue to plague TDCJ (Ward & Bishop, 2001a, 2001b, 2001c, 2001d). The pressures of increasing population and limited budgets continue to account for a significant portion of recent

deterioration of conditions in the prison system. Overcrowding threatens to overwhelm the capacity of the correctional system to maintain minimally adequate living conditions. The fiscal crisis currently facing the state has undermined the progress made toward achieving and maintaining minimally adequate conditions. For instance, according to a 2004 article in the *Texas Observer*,

> With the state of Texas facing a $9.9 billion budget shortfall, the Texas Department of Criminal Justice has been forced to undertake a number of cuts in many areas. The first of those cuts have hit home for the inmate population, as inmates now are being supplied with a roll of toilet paper once every two weeks as opposed to one roll per week.

The current discourse on crime and punishment in this country is simplistic, fraught with ignorance, and tinged with unwarranted hysteria, mostly to the credit of politicians. Worse, problems are ongoing; the ACLU (2004) and Human Rights Watch have documented Texas prisons' notoriety in prison rape cases.

Allen Hightower directs the committee in charge of health care in Texas prisons. It is the system he helped design when he represented Huntsville in the State Legislature. However, Hightower stated when asked, "Should I know more about quality of care? Maybe. I don't know. I've never really sat down and thought about it. It's not something I think about. I have confidence that the universities are thinking about that." The question for Johnson and for Hightower, for legislators, for anyone concerned about justice in Texas, is this: How would they know about the quality of care? They have not been there. Further, the secrecy involving prison records is protected by the Legislature.

This study has established the usefulness of having a clear understanding of the historical material in order to comprehend the larger trends in the prisons, society, and in the culture. In the end it took litigation and judicial intervention to penetrate this particular organization. This use of litigation as an instrument for systemic organizational change demands a wide breadth of understanding by the Judge, especially when old values and institutional patterns are challenged. Judge Justice held on to his ideas of what was right and what was wrong. As Eulau and McCluggage (1996) wrote about such staying power, "Institution building is an arena of human error where even angels should fear to tread" (p. 71).

The problem of effectively managing prisoners with mental or physical illness seems to be one of those chronic problems that our society has not solved, but ought to handle humanely. As social workers we must not forget that as social inquirers in the public domain, we are morally and ethically compelled to assume greater responsibility for and a more active role in the social policy arena. Social workers and others must become negotiators and social change catalysts seeking social justice as proactive as a player accountable in the policy arena. Of pivotal significance to the dizzying pluralism of social inquiry in the present era is the recognition that values permeate all observations.

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Vita

Michelle Childers (better known as Mike) was born in Austin, Texas, to Tommy and Vernon Childers. She grew up in Marble Falls, Texas, and after graduating from St. Stephens Episcopal School in Austin attended Beloit College in Beloit, Wisconsin, where she received a Bachelor's Degree in Sociology. After spending years as a child protective specialist in rural central Texas communities, she attended The University of Texas at Austin and, in 1986, received her Master of Science degree in Social Work. After a decade of raising her four children along with many horses and cattle at their ranch in Marble Falls and Dryden, Texas, she entered The University of Texas at Austin Ph.D. program in Social Work—the biggest challenge so far.

Mike will eventually return to ranching, as well as publishing her research, on the Texas–Mexico border in the far West Texas desert.

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